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No. 711 ✓ 1827

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SPENCER G. YOUNG,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States, for the District of Idaho, Eastern Division

HON. CHARLES C. CAVANAUGH, District Judge.

J. A. CARVER,
United States Attorney for the
District of Idaho;
E. H. CASTERLIN,
FRANK GRIFFIN,
Assistant U. S. Attorneys for
the District of Idaho;
R. L. SLAUGHTER,
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Justice,
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HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Appellee.

Filed....., 1934

Clerk

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HON. CHARLES C. CAVANAUGH, District Judge

STATEMENT OF THE CASE

This is an action brought by Spencer G. Young against the United States of America on a policy of War Risk Insurance. The complaint, which was filed February 4, 1932, (Tr. 9), alleges jurisdiction; plaintiff's enlistment in the United States army on July 5, 1916, and his discharge therefrom on April 28, 1919; the issuance to him

of a policy of War Risk Insurance in the sum of \$10,000 on November 8, 1917; that premiums were paid on the policy through April, 1919, and the same continued in force to and including May, 1919; that while the policy was in full force and effect, plaintiff was subjected to hardships, machine gun, rifle and shell fire, and underwent exposure to the elements and suffered from the lack of shelter, food and water and was compelled to eat impure food and drink impure water and was gassed and contracted colitis, asthma, flat feet, stenosis of the pylorus, psychosis, psychoneurosis and shell shock; that as a result he has been totally and permanently disabled from a time within the effective dates of the policy; that claim was made on February 12, 1931, and was denied on January 25, 1932; that a disagreement exists; that plaintiff elects to make claim upon the original policy of War Risk Insurance and tenders to the defendant all subsequent contracts of insurance.

To this complaint defendant demurred generally and specifically and filed its motion to strike (Tr. 14, 15). The demurrer being overruled and the motion to strike being denied, defendant answered by denying all allegations contained in paragraph 6 of the complaint (Tr. 11), which sets forth the total and permanent disabilities of the plaintiff, the cause thereof and the period during which the plaintiff became totally and permanently disabled (Tr. 18), and further sets forth all the subsequent policies of insurance issued under the War Risk Insu-

rance Act of October 6, 1917, and all acts amendatory thereof and supplemental thereto. The answer was later amended to deny all allegations concerning the filing of the demand and existence of a disagreement. On the issues thus formed a trial of the cause was had before a jury on October 21, 1933, wherein defendant's motions for a directed verdict were denied (Tr. 23) and the jury returned a verdict in favor of the plaintiff (Tr. 23), on which a judgment was filed herein on October 23, 1933, against the defendant (Tr. 24). From this judgment the defendant appeals (Tr. 193).

STATEMENT OF FACTS

Plaintiff is a man thirty-nine years of age, with a 3-year high school education (Tr. 29, 65). Plaintiff's war service in France is divided into an active period from March, 1918, to October, 1918 (Tr. 53), and an inactive period from October, 1918, to April, 1919, when he embarked for the United States (Tr. 53).

During the active period the certificate of discharge, which was accepted by the plaintiff as correct (Tr. 55-56), states that plaintiff was in the following engagements: Lorraine, Feb. 28, 1918, to June 18, 1918; Champagne, July 14 to July 18, 1918; Marne, July 26 to August 4, 1918; St. Mihiel, September 12 to September 26, 1918. The certificate also shows that plaintiff's physical condition was good when discharged (Tr. 56). Plaintiff included in the list of engagements Argonne Forest (Tr. 54). During this active period, plaintiff was engaged as

a signalman, a runner and an infantryman. He was gassed four times (Tr. 57). The first time was during May, 1918 (Tr. 31, 53), after which he remained in a dugout for about one week. Then he returned to active service for about two weeks, when he was gassed a second time and remained in his dugout for a period of from seven to ten days (Tr. 58). During this period he had a gas mask, and the other boys who were with him at the time of the gas attacks went back for their food and rations and continued their activities (Tr. 58). Plaintiff then fractured his ankle, which laid him up for from ten to fourteen days (Tr. 59). He did not go to a hospital but had his ankle bandaged in the field. After this he went right ahead in his service (Tr. 60). About six weeks after the second instance, he received a third gas attack, but went ahead with his work as before as best he could (Tr. 60).. In October, 1918, he ate some gassed food, as a result of which he began his inactive period. During the active period plaintiff states that he was subjected to terrific gun fire; that his dugout was blown in; that he acted as a runner in periods of great danger; that he was without necessary food; that he acted as guard of dead soldiers and that during all of this time, because of these things, he became nervous, could not sleep and jumped at loud noises. However, plaintiff went right on with his duties up to the last gas attack and according to his own statement suffered more than others who were at the same place at the same time of these several gas attacks.

During the inactive period, plaintiff was at a hospital from October, 1918, to January 1, 1919 (Tr. 53), and then was transferred to a convalescing hospital to about April 1, 1919. With the exception of the medical aid which he received at the time his ankle was fractured, there was no medical service during the active period. While at the convalescing hospital, plaintiff was placed in the diarrhea ward (Tr. 40). The service record shows that plaintiff had no trouble with diarrhea and vomiting after November 8, 1918 (Tr. 41), and that on December 6, 1918, he was discharged to duty (Tr. 61).

Plaintiff does not agree with the service record concerning hospitalization (Tr. 62), although about December 3, 1920, when applying for compensation, plaintiff in writing stated the nature and extent of his disability and stated that the disability began in April, 1920, as soon as he did any heavy work (Tr. 63, 64). Plaintiff believed that that statement must have been true to the best of his knowledge when he made it (Tr. 62). On January 29, 1927, in application for conversion of insurance, plaintiff stated, "Question No. 6—Are you now permanently and totally disabled (Answer yes or no)," and the answer was "No." "Question No. 8,—Have you ever made application for government compensation?" Answer, "Yes" . . . "Question,—For what disability? Stomach condition." At the time this application and statement were made, plaintiff believed his answers therein contained to be true (Tr. 69).

On June 30, 1921, plaintiff made application for reinstatement of government life insurance, in which he stated that he had made application for government compensation in December, 1920, based on being gassed in action (Tr. 66). Plaintiff's written application for disability allowance, dated July 11, 1930, claims disability on account of asthma (Tr. 70). The service record shows that the plaintiff at the time of his discharge the latter part of April, 1919, answered the question, "Do you have any reason to believe at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disease or impairment of health whether incurred in the military service or not," in the negative. He explains this by saying that, "I wanted to get home" (Tr. 42).

Ever since April 30, 1929, plaintiff has had the advice and assistance of the Regional Manager of the Veterans' Bureau, Boise, Idaho, in furthering and securing additional benefits under the provisions of the World War Veterans' Act (Tr. 73).

Plaintiff arrived home about May 3, 1919, and continued working for his father on the farm all that year. He was also on his father's farm in 1920. During this time he herded sheep for Mr. Hulett for about thirty days and helped him lamb. He received a check of \$40.00 for the lambing. He was on both day and night shift. About six more helped with this work (Tr. 72). On his father's farm he helped with the chores, hauling manure, riding

after cows, changing water, riding a two-way plow one-half of the time during that week and taking care of horses more than half of the time (Tr. 43). In 1920 he tried to weed beets, but the crop was a failure (Tr. 44). In 1921 he worked for Mr. Robinson on the farm for \$60.00 a month. He plowed until the crops were in and worked every day with the exception of Sundays. He was here two and a half months. He also rode for cows, rode after the mail, rode up in the hills and milked cows (Tr. 45). After this he went home for a month, doing chores and light work. He then worked for Gruder Jon as a water monkey, tending his team and hauling two and sometimes three tanks of water a day to the machine. For this he received \$100.00 a month for himself and team, working about six months. During the winter of 1921 and 1922, plaintiff kept Mr. Robinson's place, receiving only his board. During this period there was no farm work to do, but when he did farm work he received \$60.00 a month in addition to his board (Tr. 76). During the fall and winter there was nothing to do except milk the cows part of the time and feed some chickens (Tr. 76). In February or March, 1922, (Tr. 45) plaintiff began driving a car for a salesman for the J. B. Colt Company. Later he became installing agent for the company, setting up acetylene lighting plants (Tr. 75), the minimum charge for installation being \$25.00 and the maximum \$75.00. Plaintiff installed about a dozen plants in the fall of 1922 (Tr. 76). When he worked for the J. B. Colt Company on a commission, he earned about

\$50.00 a month, and when he was installing for the company, he made about \$75.00 per month (Tr. 46).

In January, 1923, plaintiff married and moved to a house on his father's farm and did some light work in the beets. He then had an operation. In the fall of 1923 he worked for a laundry, watching a drier and polishing and cleaning the washers (Tr. 47). He had no one to help him in this work (Tr. 76), but when he was required to fire the boiler, he was unable to do the work. He asked for this job and did all the work required of him excepting shoveling the coal. He quit this job (Tr. 76). He then had a contract with the gas company for unloading three cars of coal, one car at a time. He unloaded some of the coal himself and hired men to help him. He received \$30.00 per car for this work, making a net of \$15.00 a car. He finished this contract and then sought work elsewhere (Tr. 47, 77).

About the 1st of April, 1924, he began working for a farmer named Randall. He stayed there three or three and a half months and received \$50.00 a month with a bonus of \$5.00 a month if he stayed through the summer. He did not stay through the summer. While here he drilled grain with assistance, plowed, helped with the chores. This work tired him and he came late to work. He was discharged the latter part of July (Tr. 47-48).

After this he moved to a ranch near his father's farm, where he stayed during 1925, 1926 and 1927. The ranch contained sixty acres, with forty acres under cultivation.

During those years he put in wheat and potatoes. The first year he ran half of the place and his father ran the other half. Plaintiff plowed and exchanged work with his father. Plaintiff rode a cultivator part of the time and harrowed peas. During this period, he had hired help. The heavy work caused pains. In 1925, and regularly after that, plaintiff was in the Veterans' Hospital at Boise.

After leaving the ranch, he moved to Idaho Falls and got a job in the sugar factory picking out tailings. He had no help on this job. He then went to the Veterans' Hospital. Intermittently ever since he left the J. B. Colt Company, he has done peddling as an odd job, which made him \$10.00 a month (Tr. 49, 77).

In 1929 he worked for the Sunnyside Dairy for about three months. He delivered milk. The work ended by mutual agreement. After that he sold musical instruments. In the fall of 1929 he moved to Boise and in the spring of 1930 he acted as a collector for the Metropolitan Insurance Company for about three months, receiving about \$100.00 per month (Tr. 50). He also testified that this employment ran for four or four and a half months. During this time he drew \$30.00 a week. He does not know how much he received as commissions (Tr. 75).

In the winter of 1930 or the spring of 1931, plaintiff went to California for five months. While here he did some cultivating and worked for a month or two, receiv-

ing in all \$100.00 (Tr. 50). During the summer of 1931 he took up a homestead near Idaho Falls and has been living there in the summer ever since. He has put up some fencing and shingled his cabin (Tr. 50-51).

In 1932 he sought and received a job at the Shelley Sugar Company, which continued two and a half months. He received \$2.30 a day. His job was to measure sirup. While here he had a sick spell. It was not heavy work but required someone to perform the duty (Tr. 51, 77).

Plaintiff was married in 1923 and at that time considered himself able to support himself and wife (Tr. 78).

The work record shows that plaintiff engaged in farming, herding sheep (Tr. 72), choring, cultivating, milking, feeding, cleaning ditches (Tr. 84, 85), weeding beets, plowing, water monkey (Tr. 45), driving a car, installing light plants (Tr. 75), working in laundry, unloading coal, general farming (Tr. 88), hauling potatoes (Tr. 89), picking potatoes (Tr. 91), figuring and estimating (Tr. 98), working in a sugar factory, delivering milk, insurance collector and homesteading. This work was not always steady but in many instances he kept on (Tr. 104, 106). In some respects he worked but worked slowly (Tr. 100, 105). Work seemed to make him thin, pale and to perspire (Tr. 84, 88, 89, 99, 107) and resulted in fitful night rest (Tr. 82, 98, 107). Plaintiff claimed \$2.65 per diem for loss of time while attending the Veterans' Hospital.

The medical testimony on behalf of the plaintiff shows

that Dr. Rigby, plaintiff's cousin, operated upon the plaintiff in 1923 for appendicitis and at that time took a history of the case. The doctor stated that the plaintiff was totally and permanently disabled in 1923 (Tr. 119, 120). The cause of the disability was shell shock and neurasthenia (Tr. 119). A hypothetical question (Tr. 120-139) was then put to the doctor by plaintiff's attorney, which included the definition of total and permanent disability (Tr. 140) and which also included the following: 'Q. Assuming that definition, Doctor, and the facts as stated and testified to— A. In my opinion, according to the definition and history and assuming it is correct, I would say that he was totally and permanently disabled at that time. Q. Was he totally and permanently disabled at the time of his discharge? A. Yes, sir.' (Tr. 141).

Dr. Lowe, a medical witness for the plaintiff, was interrogated on direct examination as follows: "Q. You have heard the testimony and you have heard the history here of this man, Spencer Young. A. Yes, sir. Q. And you have in mind that history and you also heard the evidence in this case? A. Yes. Q. And you have in mind the facts narrated in this history? A. Yes." The definition of total and permanent disability was then given the witness and he stated it was his opinion that the plaintiff was totally and permanently disabled at the time he arrived at his home, May 3, 1919 (Tr. 147-148). This witness also included in his opinion his belief that there is something organically wrong with the plaintiff (Tr. 157).

Dr. H. E. Foster, a medical witness for the defense, admittedly qualified to testify as a physician and surgeon and neuropsychiatrist (Tr. 164), gave his opinion that the plaintiff was not totally and permanently disabled and that he would be able to carry on in many occupations (Tr. 169).

ASSIGNMENT OF ERRORS

I.

The Court erred in overruling defendant's objection to plaintiff's testimony as follows, to-wit:

“Q. Your service record contains the statement by you at that time under declaration of soldier where the question is asked if you have any reason to believe at the present time you were suffering from the effects of any wound, injury or disease or that you have any disease or impairment of health, whether incurred in the military service or not, and in reply to that you answered ‘No.’

A. Yes, I did.

Q. Why did you do that?

A. I wanted to get home.

MR. SLAUGHTER: I object to that as an attempt to impeach the plaintiff's own witness.

THE COURT: Overruled.”

II.

The Court erred in overruling defendant's objection to the testimony of Mrs. Spencer G. Young, as follows, to-wit:

"Q. About how much of the time did he work on that job?

A. We worked perhaps two or three hours a day, and I did part of the work, caring for the chickens and all the light work that it was possible for me to do.

MR. SLAUGHTER: I move that part of the answer with reference to what she did and had to do be stricken. It is not responsive and further not material.

THE COURT: Overruled."

III.

The Court erred in overruling defendant's objection to the hypothetical question put to the witness, Dr. Charles R. Lowe, in the following form and manner, to-wit:

"Q. You have heard the testimony and you have heard the history here of this man Spencer Young?

A. Yes, sir.

Q. And you have in mind that history and you also heard the evidence in this case?

A. Yes.

Q. And you have in mind the facts narrated in this history?

A. Yes.

Q. And the definition for permanent and total disability is as follows: Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Considering the history I read this morning and the definition I have given you, I will ask you to state whether or not you have an opinion as to whether within that definition Mr. Young was totally and permanently disabled at the time he arrived at his home which he testified was May 3, 1919?

A. Yes.

MR. SLAUGHTER: I object to the witness answering that question because the hypothetical question, included in this question, was not based on a substantial statement of the facts and contained matter prejudicial and stricken from the record and it invades the province of the jury.

THE COURT: I will state to you, gentlemen of the jury, that any matter the court has stricken from

the record during this trial you are not to consider in considering the answer to this hypothetical question. I will overrule the objection.

MR. SLAUGHTER: Exception, please.

Q. You say you have an opinion?

A. Yes, sir.

Q. What is it?

A. That he was totally and permanently disabled at the time he reached home.

Q. What in your opinion was the disease or diseases that made him permanently and totally disabled?

A. Shell shock and neurasthenia.

Q. Is that a subdivision of psychoneurosis?

A. It is.

Q. Do you have an opinion as to when Mr. Young became totally and permanently disabled?

A. Yes, sir.

Q. When was it?

A. I would place the date at the time he came home.

Q. In your opinion will he ever recover from this condition of total and permanent disability?

A. I don't think he will."

IV.

The Court erred in denying defendant's motion for a directed verdict presented after plaintiff had rested, which was as follows:

“MR. SLAUGHTER: Comes now the defendant at the close of the evidence for the plaintiff, the plaintiff having rested, and moves the court to direct a verdict in favor of the defendant and against the plaintiff on the ground that the evidence is insufficient to show that the insured became totally or permanently disabled or totally and permanently disabled within the meaning of the insurance policy, at a time when the policy was in full force and effect, that is between November 8, 1917, and May 31, 1919, and upon the further ground that in event a verdict was found in favor of the plaintiff and against the defendant, the evidence would be wholly insufficient to sustain such a verdict or support any judgment rendered thereunder.

THE COURT: The motion is denied.

MR. SLAUGHTER: Exception, please.”

V.

The Court erred in overruling defendant's motion for a directed verdict renewed after the plaintiff and defendant had both rested, as follows, to-wit:

“MR. CASTERLIN: At this time the govern-

ment renews its motion as made at the conclusion of the plaintiff's case.

THE COURT: It is denied."

VI.

That the evidence is wholly insufficient to support the verdict in that the evidence does not establish that the plaintiff was or became totally and permanently disabled while his war risk insurance contract, upon which this action is predicated, was in full force and effect.

VII.

That the verdict and judgment were contrary to law.

POINTS AND AUTHORITIES

I.

Under the War Risk Insurance Act, plaintiff has the burden of proving (1) existence during the effective dates of the policy of insurance of total disability, and (2) that such total disability was then and ever since has been and probably will continue to be permanent.

U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800.

U. S. v. Rentfrow (CCA 10), 60 Fed. (2d) 488.

U. S. v. Diehl (CCA 4), 62 Fed. (2d) 343.

II.

A case should never be submitted on a question of probabilities with direction to find with the greater prob-

ability. A mere scintilla of evidence is not sufficient to warrant a submission of issue of facts to a jury.

U. S. v. Lawson (CCA 9), 50 Fed. (2d) 646.

Nichols v. U. S. (CCA 9), 68 Fed. (2d) 597.

III.

The question of total and permanent disability is for the jury only if and when reasonable men may differ on the facts.

Nicolay v. U. S. (CCA 10), 51 Fed. (2d) 170.

U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800.

IV.

If from the facts and the inferences to be drawn therefrom a verdict, if returned, would have to be set aside, the court should direct a verdict in the first instance.

Nichols v. U. S. (CCA 9), 68 Fed. (2d) 597.

Slocum v. New York Life Ins. Co.,

228 U. S. 364, 369.

V.

An unresponsive answer should be stricken, especially when the answer is immaterial.

Wigmore On Evidence (2d Ed.), Par. 18,

Note 3; Par. 785.

Marinoni v. State (Ariz.), 136 Pac. 626.

VI.

A party may introduce conflicting statements to de-

stroy probative effect of testimony of own witness only where surprised by witness' adverse testimony, or in case of entrapment.

Hickory v. U. S., 151 U. S. 303,
14 Sup Ct. 334, 38 L. Ed. 170.

Fong Lum Kwai v. U. S. (CCA 9),
49 Fed. (2d) 19.

Murray v. Third Nat. Bank (CCA 6),
234 Fed. 483, 491.

Putnam v. U. S., 162 U. S. 687, 691;
16 Sup. Ct. 923; 40 L. Ed. 1118.

Jones Evidence, 3d Ed., p. 1344, Note 75.

Sneed et al v. U. S. (CCA 5),
298 Fed. 911, 914.

Randazzo et al. v. U. S. (CCA 8),
300 Fed. 794, 797.

St. Clair v. U. S., 154 U. S. 134;
14 Sup. Ct. 1002; 38 L. Ed. 936.

Levy v. U. S. (CCA 8),
35 Fed. (2d) 483, 484.

VII.

An opinion cannot be based on evidence which witness has heard, particularly if there are inconsistencies or discrepancies in the evidence. This results in weighing the evidence, which is the province of the jury.

Dexter v. Hall, 15 Wall (U. S.) 9;
21 L. Ed. 73.

People v. Le Doux (Cal.), 102 Pac. 517.

Manufacturer's Acc. Ind. Co. v. Dorgan,
58 Fed. 945.

Dunagan v. Appalachian Power Co. (CCA 4),
33 Fed. (2d) 876, 878.
(cert. den. 280 U. S. 606)

ARGUMENT

During the direct examination of the plaintiff, his Exhibit No. 1, being the service record, was admitted in evidence without objection. The plaintiff was then asked the following question,—

“Your service record contains the statement by you at that time (April, 1919), under Declaration of Soldier, where the question is asked if you have any reason to believe at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disease or impairment of health, whether incurred in the military service or not, and in reply to that you answered ‘no’.”

A. Yes, I did.

Q. Why did you do that?

A. I wanted to get home.

To these questions and answers objection was made that it was an attempt to impeach plaintiff's own witness. The objection was overruled. The plaintiff, having introduced the service record as a part of his case in chief,

thereby adopted each and every declaration of the plaintiff therein contained as a part of plaintiff's testimony. Having adopted the contents of this exhibit and without any preliminary questions, the witness then proceeded to testify contrary to the adopted statement of the plaintiff. In other words, plaintiff first adopted the statement that he had no reason to believe at the time of his discharge that he was suffering from disease or impairment of health and then immediately proceeded to testify orally to the contrary. We believe that the course adopted in introducing this proof comes clearly within the rule of law that a party may introduce conflicting statements only where he is surprised by the witness' adverse testimony or in case of entrapment. It cannot be claimed in this instance that the plaintiff was surprised for two reasons,—first, the plaintiff himself made both statements and he could not surprise himself; second, in the same way he could not entrap himself or be an adverse or unwilling witness. There being no surprise, no entrapment and no hostility, the plaintiff should be bound by his original statement, the proof first admitted, the same not being ambiguous, uncertain, or made under any circumstances which would require an explanation.

Mrs. Spencer G. Young testified, as set forth in the second specification of error, in response to the question, "About how much of the time did he (plaintiff) work on that job," that "we worked perhaps two or three hours a day, and I did part of the work, caring for the chickens

and all the light work that it was possible for me to do.” An objection was made that the answer was not responsive and not material, with the request to have that part of the answer referring to what she did and had to do stricken. This was overruled. We believe that this was an error and that the entire answer should have been stricken under the rule that an unresponsive answer should be stricken, especially when the answer is immaterial. The question which arises in this action turns on the ability of the plaintiff to follow a gainful occupation and any testimony as to what the plaintiff’s wife did is immaterial, as it does not tend to prove or disprove the issue. Proof as to what the plaintiff did is material, but proof of what third parties do is immaterial. In any event no part of the answer is responsive to the question. We believe the great weight of authority and that the better rule is that any answer which is not responsive should be stricken upon motion of either party.

Dr. Lowe was called as an expert witness by the plaintiff and his qualifications were admitted. Dr. Lowe, as stated in assignment of error No. 3, testified that he had heard the testimony in this case and that he had “heard the testimony here” of the plaintiff; that he had that history in mind and the facts narrated in the history; that based upon the testimony which he had heard and the definition as given to him, he had an opinion as to total and permanent disability and said what the opinion was. We submit that the overruling of appellant’s objection to

the doctor's opinion based and given entirely upon the evidence which he had heard in this case was error, the objection being to the effect that the question as put contains matters which were stricken from the record and invades the province of the jury. There is no question but what there was conflicting evidence in plaintiff's case. One instance in particular is that contained in assignment of errors No. 1, where the plaintiff disputed the service record. It is not necessary to particularly point out other discrepancies and contradictions in the record. The witness having heard all of the evidence and the testimony in this case was required by the question given him to determine whether the plaintiff stated the truth at the time he made the statement contained in the service record or told the truth at the time he testified subsequently. This same duty was imposed upon the expert witness in respect to all other conflicting questions. The expert first had to determine where the weight of the evidence was before he could express any opinion upon the facts. In other words the witness had to determine what the facts were before he could express an opinion, and the opinion which he expressed was based and founded upon the facts which the witness elected to be true. In such a case, the witness is invading the province of the jury and is not assisting the jury to determine what the facts are but is advising the jury of what he judges the facts to be.

In respect to the testimony of Dr. Rigby, a hypothetical question was put to him (Tr. 120-140) and then the

doctor was asked to assume the definition and the facts as stated and testified to (Tr. 141). No exception was taken to this question and the stating of the question is not assigned as an error. We call the court's attention to this testimony only to assist the court in arriving at a correct conclusion in respect of the following statement:

There were only two medical witnesses in behalf of the plaintiff and, if it is found that the trial court erred in not sustaining appellant's objection to the question put to Dr. Lowe, then plaintiff is without any proper medical testimony whatsoever and without any proper medical opinion. It cannot be contended that the testimony of Dr. Lowe is the same as other proper testimony and therefore is not prejudicial of appellant's position, even though there was no objection to Dr. Rigby's opinion. To permit Dr. Lowe to corroborate Dr. Rigby by improper expert opinion would materially impress the jury in support of plaintiff's case and would for that reason be highly prejudicial to the defendant-appellant. We believe that the correct rule of law is that an opinion cannot be based on evidence which the witness has heard, but an opinion must be based upon a hypothetical question stated in conformity with the established rules of evidence.

The remaining assignments of error to the effect that defendant's motions for a directed verdict should have been granted and that the evidence is insufficient to support the verdict and therefore the same is contrary to law

will all be discussed together. We might first remark that, even if the evidence, exclusive of the medical testimony, might have been sufficient to allow the case to be submitted to a jury, without conceding the fact, yet the evidence as a whole, including that which should have been stricken and that which should not have been permitted to go to the jury, clearly warrants the conclusion that the court should have granted a motion for a directed verdict. Taking up the evidence, omitting the medical testimony and the portions which should have been stricken, we believe that there is in this case a sufficient work record, coupled with sufficient medical testimony on the part of the defendant, to warrant the court in granting a motion for a directed verdict. The complete war record shows that from March, 1918, to October, 1918, the plaintiff was active in military service and that after every engagement the plaintiff returned to active service and performed the duties of a soldier. This is made to appear by reference to the statement of facts which refers to the transcript. Plaintiff testified positively that when he was gassed and required to remain in a dugout, all of the other soldiers who were with him at the time he was gassed performed their regular duties. Plaintiff does not attempt to explain that his condition was different from that of other soldiers who performed their regular services, and in addition to this failure to so explain, plaintiff admits that in each instance excepting the last, he did return to actual active duty. There was no medical service during plaintiff's active period, and the service record

does not show any trouble with diarrhea and vomiting after November 8, 1918. It does show that on December 6, 1918, he was discharged to duty.

Plaintiff on two occasions, first, when he made the statement in his service record, and second, when he applied for compensation on December 3, 1920, stated that he had no disability at the time he was discharged from the army. The first instance is the statement which has been discussed under the first assignment of error and the second is contained in defendant's Exhibit No. 5, where it appears that plaintiff claimed his disability began in April, 1920 (Tr. 63-65). Plaintiff also stated that at the time he made his claim for compensation he believed that the statement that his disability began in April, 1920, was correct. This corroborates and substantiates the statement which appears in the service record. Again on January 29, 1927, in his application for conversion of insurance, plaintiff again stated that he was not then permanently and totally disabled and at the time he made this last statement plaintiff believed the answers to be true. On July 11, 1930, plaintiff's application for disability allowance is based on asthma and makes no reference to any disability now appearing in this action. After having expressed his opinion so many times and having stated that on each occasion he believed the statements to be true when he made them, we are forced to the conclusion that plaintiff believed he was not totally and permanently disabled as late as January 29, 1927, and

that as late as July 11, 1930, although claiming disability, he did not believe that his disability then existed by reason of any of the infirmities stated in his complaint.

Plaintiff's work record is contained in the statement of facts and it is not necessary to review it for the purpose of this argument. During the period from 1919 to the trial of this cause, plaintiff worked at various occupations. Although this work is not continuous, it is varied in character and shows that he was able to carry on, especially in view of his admissions through all of the years that he was not totally and permanently disabled. During the year 1921, plaintiff farmed for \$60.00 a month, working every day excepting Sunday, earning \$150.00. He worked as water monkey for \$100.00 a month for himself and team, earning approximately \$600.00. During the balance of this year he was at his home or working on a ranch for his board. While working for his board, there was no farm work to do. During the year 1922, plaintiff installed lighting plants, earning approximately \$600.00, figuring the average price for that kind of work. During that year he earned from \$50.00 to \$75.00 per month for the time he was working. During the year 1924 from April 1st to about August 1st, a period of four months, he worked on a farm for \$50.00 a month or \$55.00 a month, according to his employer. During 1925, 1926 and 1927, he worked on a 60-acre ranch with 40 acres under cultivation. There is no showing that during this period he did not make a living for his

family. In 1929 he worked three months for a dairy and then moved to Boise. During 1930 he worked for three months for the Metropolitan Insurance Company at \$100.00 per month, approximately, not figuring commissions.

We submit, in view of the work record as outlined here, and in the statement of facts, taken together with plaintiff's several admissions that he was not totally and permanently disabled at late as the year 1927, it is affirmatively shown that there is not sufficient evidence to sustain the verdict in this case and that the motions for a directed verdict should have been granted, particularly at the close of defendant's testimony. This is for the reason that all of plaintiff's proof is as consistent with the theory of the defendant in this action as with the theory of the plaintiff, and consequently there is no preponderance of evidence whatsoever in favor of the plaintiff.

Attention is also called to the several statements made by the plaintiff in respect of his disabilities to show that there is considerable conflicting proof of a material nature which the expert witnesses had to weigh and determine before it was possible to render or give an expert opinion based upon the questions finally submitted.

It is the contention of the appellant in this case, and we believe the contention should be sustained, that the judg-

ment entered in this case should be reversed and the cause remanded for a retrial.

Respectfully submitted,

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Service and receipt of copy of the foregoing Brief this
.....day of April, 1934, is hereby acknowledged.

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Attorney for Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

SPENCER G. YOUNG,
Appellee.

BRIEF OF APPELLEE

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
vs. *Appellant,*
SPENCER G. YOUNG,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States, for the District of Idaho, Eastern Division.

COMMENTS ON APPELLANT'S BRIEF

We believe that under the law, it was the duty of the appellant to point out the strongest evidence produced on behalf of the appellee, and then argue that such evidence was not sufficient to make a case for appellee. Instead of doing this, the appellant has failed to state the facts favorable to the appellee. In order to save space, we will not restate the facts in the case except in connection with the arguments. However, we desire to call attention to the fact that the record has been misquoted in appellant's brief. For example, on page 15 of the brief, it is stated:

“He then worked for Gruder Jonas a water monkey, tending his team and hauling two and sometimes three tanks of water a day to the machine. For this he received \$100.00 a month for himself and team, working about *six months*.”

This is again repeated on page 35 of the brief. However, the testimony is as follows:

“Then I had a team and went out and worked for Mr. Gruderjon as water monkey. I had to tend my team and haul two and sometimes three tanks of water a day to the threshing machine. For that I received about \$100.00 a month for my team and myself. I worked for Mr. Gruderjon about *six weeks* in 1921. That is all I did in 1921.” (Tr. 45).

Again on page 29 of appellant’s brief, it is stated:

“Mrs. Spencer G. Young testified, as set forth in the second specification of error, in response to the question, ‘About how much of the time did he (plaintiff) work on that job,’ that ‘we worked perhaps two or three hours a day, and I did part of the work, caring for the chickens and all the light work that it was possible for me to to.’ ”

The record shows, however, that this was not the answer given by Mrs. Young, and the exact record is:

“Q. About how much of the time did he work on that job?”

A. *He* worked perhaps two or three hours a day, and I did part of the work, caring for the chickens and all the light work that it was possible for me to do.” (Tr. 111).

Again on pages 30 and 31 of appellant’s brief, it is argued that Dr. Lowe gave his expert opinion on the evidence that he had heard in the case, when as a matter of fact the record very clearly shows that he gave his answer in response to a hypothetical question which recited all of the facts (Tr. 147-149).

This is an appeal from a judgment based upon a verdict of the jury, which jury found that the plaintiff became totally and permanently disabled on November 1, 1918 (Tr. 24-25). The following facts were stipulated:

1. That the appellee enlisted July 3, 1916.
2. That he was honorably discharged April 28, 1919.
3. That he took out the insurance policy involved in this case on November 8, 1917.
4. That said insurance policy continued in force by reason of the actual payment of premiums through the month of May, 1919.
5. The residence of the appellee in the district was admitted.
6. That a disagreement existed.
7. That the suit was filed in time.

Thus we find that all the jurisdictional facts were stipulated at the trial.

APPELLEE'S MEDICAL EVIDENCE AS TO HIS TOTAL AND PERMANENT DISABILITY WHILE HIS POLICY WAS IN FORCE.

Dr. H. P. Rigby, whose qualifications were admitted (Tr. 118) further qualified by stating that he had worked with shell shocked patients in the Cincinnati General Hospital and also at the Oklahoma State University he had a ward of these patients; that he had known the appellee for thirty-five years and had treated him; that in 1923 he operated on him for appendicitis and at that time he went into his history and took into consideration his own knowledge of him thereafter. That his diagnosis in addition to appendicitis was that of shell shock and neurasthenia (Tr. 118-119). In 1923 the doctor found that the appellee had general weakness, pains more or less diffused and debility, and he was nervous and more or less irritable, had disturbed digestion, and further that it was hard to get a history; it would be hard to get some of the leading facts of his history and that he wasn't able to concentrate, and that the appellee was apprehensive about his condition, and he testified that from his own personal knowledge in 1923 the appellee was totally and permanently disabled on account of shell shock and neurasthenia (Tr. 119-120). He further testified that this condition of total and permanent disability has continued from that time (Tr. 120).

The doctor was then given a complete history of the case (Tr. 120-140), and testified that the appellee was totally and permanently disabled at the time of his dis-

charge from the army on May 3, 1919 (Tr. 141), and further testified that in his opinion he would never recover from his condition of total and permanent disability; that the condition has gone on with the appellee's repeated attempts to go to work and repeated failures (Tr. 141). That he was then asked:

“Q. Under that history I recited to you, when in your opinion under this history, did he become totally and permanently disabled?”

A. I think when he left the front and went to Vichy to the hospital.

Q. The date was given in the service record. It states he arrived in Vichy about October 26, 1918. That is the record. Would you say that was the time he became totally and permanently disabled?

A. That was approximately the time but he may have been disabled a few days before.” (Tr. 141-142).

The doctor further testified that in his opinion the appellee was totally disabled in 1923 because he was unable to work, complained of weakness and inability to work and nervousness and couldn't sleep, had pain in his stomach and soreness in his abdomen, and further testified that he was a sick man (Tr. 142).

This doctor further testified that long prior to the trial he had formed the opinion that the appellee would never be able to do anything; that he had evidently been shell shocked and gassed to the point where his physical

system was wrecked, and while he told the appellee to work some, the appellee did quit work or lost his job on account of his health (Tr. 146).

Dr. Charles R. Lowe, who is now medical superintendent of the State Hospital for the Insane at Blackfoot, Idaho, and who since 1911 has spent all of his time dealing with mental and nervous cases (Tr. 146-147), upon a history of the case testified that in his opinion the appellee was totally and permanently disabled at the time he reached home (Tr. 149), which was on the 3rd day of May, 1919 (Tr. 43). The doctor gave as the reason for the total and permanent disability shell shock and neurasthenia (Tr. 149), and it was the doctor's opinion that he would never recover from that condition (Tr. 149). The doctor fully explained that neurasthenia is a subdivision of psychoneurosis (Tr. 150), and he gave as his reasons for saying that the appellee was totally and permanently disabled, general weakness, palpitation of the heart, difficulty in breathing, diarrhea and constipation; mostly constipation since he was home, constant cold, fainting and weakness on exertion, and in the mental field the difficulty in concentrating and it being hard to get information from him, poor memory, poor sleep, easily startled, waking in the night with a cry and often in a cold sweat, which would indicate very unstable nervous condition (Tr. 154). The doctor further testified that he thought there was something organically wrong caused by the shell shock and his experiences in the war (Tr. 157).

Dr. Harold E. Foster, the appellant's specialist, who testified, stated that he had examined this appellee twice, found him with a pulse rate of 60 per minute; testified that his diagnosis was neurasthenia, moderate to severe (Tr. 167).

Thus we see that there was an abundance of competent medical evidence from persons well qualified that the appellee was totally and permanently disabled at a time when the policy in question was in force.

APPELLEE'S NON-MEDICAL EVIDENCE AS TO HIS SYMPTOMS

The following is the list of the things that the record in this case shows that the appellee has been suffering from since he was in France in 1918:

1. When he becomes winded and exhausted he has to lie flat on his back (Tr. 44).
2. He feels as if he would faint if he doesn't lie down (Tr. 44).
3. Attempting mental work has made him nervous (Tr. 44).
4. Attempting to work makes him weak and sick (Tr. 47).
5. Ever since he was in France he has had sieges of diarrhea which have made him very weak. These occur three or four times a year (Tr. 40).
6. When the diarrhea is not present he has suffered continuously with constipation (Tr. 40).

7. He started having severe pains in his stomach in France, and these have continued intermittently ever since, and they never entirely leave him (Tr. 48).

8. Ever since he was gassed in France he has coughed and expectorated (Tr. 52).

9. He has had a great deal of trouble sleeping at night (Tr. 35).

10. At night he wakes up and hollers and shouts and screams, and has never gotten over it (Tr. 35).

11. He has had great trouble getting to sleep since he was in France (Tr. 35).

12. He has always had to watch himself and get exhausted to where he can hardly hold his head up before he can sleep at all (Tr. 35).

13. Ever since he has been in France he has been nervous, has been unable to concentrate and remember as clearly as he did before (Tr. 35).

14. Since the war he has had no appetite and has eaten the very simplest foods (Tr. 35, 85).

15. Loud noises have caused him to jump or scream (Tr. 34).

STATEMENT OF THE CASE

The appellee served as a member of the 167th Infantry, 42nd Division. In May, 1918, he was gassed the first time. His throat and lungs were so sore he couldn't

breathe and he couldn't carry on. He had to stop and it took him all forenoon to get back (Tr. 30-31). His breathing was difficult and his nose and throat burned and his bronchial tubes felt like they were on fire. He laid in a dugout for a matter of about a week before he could breathe properly. About two weeks after the first gassing he was gassed again. He was taking messages to the front lines (Tr. 31-32). He was then called back to the front and stayed about another month. He received medical attention (Tr. 32). At one front he was in one of the greatest bombardments that ever happened. He was under heavy continuous shell fire for seventy-two hours, and testified:

“I don't believe I have ever felt the same since.”
(Tr. 33).

The concussions from the shells were so great that they would blow out the candles in the dugout. The noise was so great that a person had to shout at the top of his voice to be heard if he talked to anybody. He was called upon to go out on special duty on an elevated post, which was very dangerous (Tr. 33-34). In this regard he testified:

“This job became more and more dangerous all the time. Finally it became so dangerous that every time two men were called to go out it was like signing their death warrant—for at least one of them would never come back, and it got so they would bring them both in wounded or dead or they would

remain out, or perhaps one would struggle back, and about this time I was the next one called to perform this duty and I got ready to go out and the tower was blown and completely demolished and they took that detail off." (Tr. 34).

This made him very nervous (Tr. 34). Since the 72 hours shelling, if any loud noises happened around him, he has a tendency to jump or scream, or drop whatever he has and be very much disturbed. Since that time he has been nervous and has been unable to concentrate and this has affected his nervous system and caused him to be less efficient. Unless he uses the greatest care to eat the very simplest foods, he has had a great deal of trouble sleeping, and at nights, for some cause unknown to him, he wakes up and hollers and shouts and screams, and he has never gotten over that. He has had great trouble in getting to sleep. He has to always watch himself and get exhausted to where he can hardly hold his head up before he can sleep at all (Tr. 34-35).

He was also subjected to machine gun fire and also intermittent fire all the time and the Germans began to strike through. He saw 600 Germans in one pile, and men were continually coming back that sickened and horrified him. They were shot to pieces in every manner possible, some had their heads shot off (Tr. 35). On one occasion he fell down when he was asked to line up. He didn't have any feeling when he came to, he felt weak and sick (Tr. 36). He went out in the advance guard or

special machine gun duty (Tr. 36). He also did special guard duty around dead Frenchmen and Americans (Tr. 36). In the latter part of July, 1918, he went forward with some ammunition and was gassed again (Tr. 37). He was unable to breathe and his heart burned. He was hauled back from that front (Tr. 37). On one occasion he was knocked down by the concussion of a shell (Tr. 38). At St. Mihiel he was under about three days' shell fire. He engaged in the very dangerous work of straightening out his line (Tr. 38). He also did guard duty in No-Man's Land, watching the front lines for quite a while (Tr. 38). Sometime in October he went into the Argonne and remained until the 25th of October. He again went right up to the front and became very nervous because of the screaming day and night of the dying men. He was under fire continuously at this particular place nine days (Tr. 38-39). In the Argonne he got some poisoned food and was carried back on a stretcher and sent to a hospital. (Tr. 39). That he was in this hospital for three months. He had diarrhea, and since that time has been troubled on occasions with it three or four times a year, which has made him very weak, but he usually suffers with constipation and has been so suffering continuously since he was in the hospital (Tr. 40).

As to his condition at that time the appellee was corroborated by the witness, Melvin Busch, who met the appellee at a field hospital about the middle of October, 1918 (Tr. 82). He saw the appellee walking toward the

first aid station very feebly, almost staggering. They made a temporary camp, and the appellee would lay on the blanket. They were just immediately back of the front and the appellee was having fitful attacks during the night. (Tr. 82). The witness went after an ambulance and took appellee back on a stretcher (Tr. 83).

The service record introduced in evidence shows that the appellee at the time he was in the hospital in France was nervous and could not sleep; October 20, vomiting and diarrhea followed (Tr. 41). After leaving the hospital in France the appellee went to a casual camp and he did no military duty (Tr. 41). He then embarked to the United States and never did any more military duty after he went to a hospital (Tr. 42). Upon his discharge he went directly to the home of his father and mother. He was unable to walk a mile or even half a mile when he returned. When he did walk he was winded and his heart palpitated and beat hard and he couldn't work (Tr. 42-43). Although when he returned home in 1919 he was only 25 years old, he looked much older; his hair was gray, and he was thinner and stoop-shouldered (Tr. 117).

Since it appears from the above statement that there is substantial evidence that appellee was totally and permanently disabled at the time when his policy was in force, in order to save time we will discuss appellee's activities since he left the service in another section of this brief.

POINTS AND AUTHORITIES

I.

AN OBJECTION MADE AFTER A QUESTION IS ANSWERED IS TOO LATE AND AN EXPLANATION WHY A WRITTEN STATEMENT IS SIGNED IS NOT IMPEACHMENT.

A. THERE WAS NO PROPER RECORD MADE AT THE TRIAL.

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122
A m.St. Rep. 1065.

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore.
18.

Parks v. City of Des Moines, 191 N. W. 728, 195
Iowa 972.

Alabama Fuel & Iron Co. v. Minyard, 88 So. 145,
205 Ala. 140.

Penix v. Sloan, 3 Fed. (2d) 258. (CCA 5).

Dinet v. Rapid City, 222 Fed. 497.

26 R. C. L. 1046.

B. A COLLECTION OF WRITTEN DOCUMENTS IS NOT A WITNESS IN THE SENSE THAT SOME ONE OF THE DOCUMENTS CANNOT BE IMPEACHED.

Eckermann v. McDonough, 186 N. W. 361
(Nebr.).

Henny Buggy Co. v. Patt, 73 Iowa 485,
35 N. W. 587.

Peters v. Taylor (Ariz.), 251 Pac. 446.

C. A PARTY INTRODUCING A COLLECTION OF WRITTEN INSTRUMENTS DOES HAVE THE RIGHT TO EXPLAIN THE SAME.

Kelley v. Jordan Marsh Co., 179 N. E. 299.

Lyons v. Davy-Pocahontas Coal Co. (W. Va.),
84 S. E. 744.

Independence Indemnity Co. v. Polk (Tex. Civ.
App.), 14 S. W. (2d) 330.

Newman v. Levinson, 165 N. E. 122.

Gilliland v. Armstrong, 71 So. 700.

Chrisman v. Gregory's Heirs, 4 B. Mon. (Ky.)
474.

Merchants' Bank of Macon v. Rawls, 7 Ga. 191,
50 Am. Dec. 394.

Hoffman v. Hendricks (Okla.), 96 Pac. 589.

Peters v. Taylor (Ariz.), 251 Pac. 446.

Aetna Life Ins. Co. v. Ward, 140 U. S. 76,
35 L. Ed. 371.

D. THE CASES CITED BY THE APPELLANT ARE NOT IN POINT.

II.

IT WAS NOT PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO STRIKE THE ANSWER OF MRS. SPENCER G. YOUNG.

A. A MOTION TO STRIKE AS UNRESPONSIVE CAN ONLY BE MADE BY THE EXAMINER.

Page Steel & Wire Co. v. Blair Engineering Co.,
22 Fed. (2d) 403 at 406; Certiorari denied,
276 U. S. 623, 48 S. Ct. 303, 72 L. Ed. 737.

Hirshfeld v. Dana, 223 Pac. 451.

Jones, Commentaries on Evidence, Second Edition,
Volume 5, page 4523.

B. THE STRIKING OF THIS TESTIMONY
WAS WITHIN THE DISCRETION OF THE
COURT.

Jones, Commentaries on Evidence, Second Edition,
Volume 5, page 4523.

C. SINCE THE WITNESS WAS PERMITTED
TO ANSWER THE IDENTICAL QUESTION IN
THE SAME MANNER WITHOUT OBJECTION,
THE ALLOWING OF THE ONE ANSWER TO
STAND IS NOT PREJUDICIAL ERROR.

United States v. Dudley, 64 Fed. (2d) 743.

Shwab v. Doyle, 269 Fed. 321 at 333.

D. THE REFUSAL TO STRIKE MATERIAL
EVIDENCE IS NOT ERROR, AND IF IMMA-
TERIAL IS NOT PREJUDICIAL ERROR.

United States v. Lawson, 50 Fed. (2d) 646
(CCA 9).

United States v. Phillips, 44 Fed. (2d) 689.

Walter v. Rowlands, 28 Fed. (2d) 687 (CCA 9).

Judicial Code, Section 269, amended; Title 28,
Par. 391, U. S. C. A., Note 203.

E. THE AUTHORITIES CITED BY APPELLANT ARE NOT CONTROLLING.

III.

PREJUDICIAL ERROR CANNOT BE PREDICATED ON EVIDENCE THAT IS NOT OBJECTED TO, NOR CAN ANY GROUND FOR REVERSAL BE URGED WHICH IS NOT STATED IN THE OBJECTION.

A. AN OBJECTION MADE AFTER A QUESTION IS ANSWERED IS TOO LATE.

Penix v. Sloan, 3 Fed. (2d) 258 (CCA 5).

Dinet v. Rapid City, 222 Fed. 497 (CCA 8).

26 R. C. L. 1046.

Alabama Fuel & Iron Co. v. Minyard, 88 So. 145,
205 Ala. 140.

Parks v. City of Des Moines, 191 N. W. 728, 195
Iowa 972.

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore.
18.

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122
Am. St. Rep. 1065.

B. WHERE TESTIMONY IS ADMITTED WITHOUT OBJECTION, PREJUDICIAL ERROR CANNOT BE ASSIGNED THEREON.

Lederer v. Real Estate, etc., 273 Fed. 933
(CCA 3).

Noonan v. Caledonia Gold Mining Co., 121 U. S.
393, 400, 7 Sup. Ct. 911, 30 L. Ed. 1061.

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299.

Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313,
27 L. Ed. 641.

Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed.
779.

C. THERE WAS NO OBJECTION MADE AT
THE TIME THAT THE DOCTOR WAS BASING
HIS OPINION UPON THE EVIDENCE THAT
HE HEARD.

Camden v. Doremus, 3 How. 515; 11 L. Ed. 705.

Burton v. Driggs, 20 Wall. 125, 133; 22 L. Ed.
299.

Continental Ins. Co. v. Fortner, 25 Fed. (2d) 398
(CCA 6).

Twohy Bros. Co. v. Kennedy, 295 Fed. 462
(CCA 9).

Quaker Oats Co. v. Grice, 195 Fed. 441 (CCA 2).
22 C. J. p. 710, sec. 800.

Jones, Commentaries on Evidence, Second Edi-
tion, Volume 3, p. 2452, sec. 1341.

Knight v. Overman Wheel Co. (Mass.), 54 N. E.
890.

Prosser v. Montana Central Ry. Co. (Mont.),
43 Pac. 81.

Williams v. Marini, 162 Atl. 796.

D. APPELLANT'S CASES ARE NOT IN
POINT HERE.

Southwest Metals Co. v. Gomez, 4 Fed. (2d)
215; 39 A. L. R. 1416 (CCA 9).

IV.

APPELLEE'S WORK RECORD SINCE THE
WAR IS NOT A BAR.

United States v. Alger, 68 Fed. (2d) 592
(CCA 9).

United States v. Dudley, 64 Fed. (2d) 743
(CCA 9).

United States v. Rasar, 45 (2d) 545 (CCA 9).

United States v. Jensen, 66 Fed. (2d) 19
(CCA 9).

United States v. Suomy, 70 Fed. (2d) 542
(CCA 9).

United States v. Lawson, 50 Fed. (2d) 646
(CCA 9).

United States v. Baxter, 62 Fed. (2d) 182
(CCA 9).

United States v. Burleyson, 64 Fed. (2d) 868
(CCA 9).

United States v. Francis, 64 Fed. (2d) 865
(CCA 9).

Fladeland v. United States, 53 Fed. (2d) 17
(CCA 9).

Storey v. United States, 60 Fed. (2d) 484 (CCA
10).

V.

THE EVIDENCE IS TO BE VIEWED IN THE
LIGHT MOST FAVORABLE TO APPELLEE.

United States v. Albano (CCA 9), 63 Fed. (2d)
677.

United States v. Dudley (CCA 9), 64 Fed. (2d)
743.

United States v. Leshner (CCA 9), 59 Fed. (2d)
53.

Sorvik v. United States (CCA 9), 52 Fed. (2d)
406.

United States v. Burke (CCA 9), 50 Fed. (2d)
653.

Alaska Fish Salting & By-Products Co. v. Mc-
Millan (CCA 9), 266 Fed. 26.

United States v. Griswold (CCA 9), 61 Fed. (2d)
583.

United States v. Lawson (CCA 9), 50 Fed. (2d)
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United States v. Meserve (CCA 9), 44 Fed. (2d)
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United States v. Scarborough (CCA 9), 57 Fed.
(2d) 137.

United States v. Rasar (CCA 9), 45 Fed. (2d)
545.

United States v. Riley (CCA 9), 48 Fed. (2d)
203.

VI.

INCONSISTENCIES IN APPELLEE'S STATEMENTS AND CONDUCT WERE MATTERS FOR THE JURY TO DETERMINE AND ITS DETERMINATION IS FINAL.

United States v. Dudley, 64 Fed. (2d) 743.

United States v. Albano, 63 Fed. (2d) 677
(CCA 9).

La Marche v. United States, 28 Fed. (2d) 828
(CCA 9).

Title 38, U. S. C. A., Sec. 515.

THE CASES CITED BY THE APPELLANT ARE NOT CONTROLLING HERE.

VII.

APPELLEE'S DELAY IN FILING HIS COMPLAINT WAS FULLY EXPLAINED AND IS NOT TO BE USED AS EVIDENCE AGAINST HIM.

C. 875, par. 1, 45 Stat. 964; par. 445, Title 38,
U. S. C. A.

C. 849, par. 4, 46 Stat. 992; par. 445, Title 38,
U. S. C. A.

Report by Senator Shortridge from the Committee on Finance, dated June 9, 1930, and known as Report No. 885 of the 71st Congress, second session, to accompany Calendar No. 906, on page 4 thereof.

Hayden v. United States (CCA 9), 41 Fed. (2d) 614.

VIII.

THERE WAS NO PREJUDICIAL ERROR COMMITTED IN ALLOWING DR. LOWE TO EXPRESS HIS OPINION AS TO APPELLEE'S TOTAL AND PERMANENT DISABILITY.

A. SINCE THE OBJECTION WAS MADE AFTER DR. LOWE HAD ANSWERED THE QUESTION, THE OBJECTION CAME TOO LATE.

Penix v. Sloan, 3 Fed. (2d) 258 (CCA 5).

Dinet v. Rapid City, 222 Fed. 497 (CCA 8).

26 R. C. L. 1046.

Alabama Fuel & Iron Co. v. Minyard, 88 So. 145,
205 Ala 140.

Parks v. City of Des Moines, 191 N. W. 728,
195 Iowa 972.

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore.
18.

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122
Am. St. Rep. 1065.

B. WHERE TESTIMONY IS ADMITTED WITHOUT OBJECTION, PREJUDICIAL ERROR CANNOT BE ASSIGNED THEREON.

Lederer v. Real Estate, etc., 273 Fed. 933 (CCA 3).

Noonan v. Caledonia Gold Mining Co., 121 U. S. 393, 400, 7 S. Ct. 911, 30 L. Ed. 1061.

Burton v. Driggs, 20 Wall, 125, 22 L. Ed. 299.

Stebbins v. Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779.

C. THERE WAS NO SPECIFIC OBJECTION MADE AT THE TIME THAT DR. LOWE WAS REQUIRED TO WEIGH THE TESTIMONY, AND ANY OBJECTION ON THAT GROUND WAS WAIVED.

Camden v. Doremus, 3 How. 515, 11 L. Ed. 705.

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299.

Continental Insurance Co. v. Fortner, 25 Fed. (2d) 398 (CCA 6).

D. THE GIVING OF A MEDICAL EXPERT'S OPINION WAS NOT AN INVASION OF THE PROVINCE OF THE JURY.

Russells Estate, 210 Pac. 249 (Cal).

United States v. Monger, 70 Fed. (2d) 361 (CCA 10).

- Carter v. United States, 49 Fed. (2d) 221
(CCA 4).
- Runkle v. United States, 42 Fed. (2d) 804
(CCA 10).
- 11 R. C. L., page 583, paragraph 14.
- 4 Wigmore on Evidence (2d Ed.) Sec. 1920.
- 4 Wigmore on Evidence (2d Ed.) Sec. 1921.
Note, 78 A. L. R. page 755.
- United States Smelting Co. v. Parry, 166 Fed.
407 (CCA 8).
- Cropper v. Titanium Pigment Co., 47 Fed. (2d)
1038, 78 A. L. R. 737.
- Holmes v. Goldsmith, 147 U. S. 150, 164, 13 Sup.
Ct. 288, 37 L. Ed. 118.
- Williamson v. United States, 207 U. S. 425, 451,
28 Sup. Ct. 163, 52 L. Ed. 278.
- Alexander v. United States, 138 U. S. 353, 356,
11 Sup. Ct. 350, 34 L. Ed. 954.
- Moore v. United States, 150 U. S. 57, 60, 14 Sup.
Ct. 26, 37 L. Ed. 996.
- Clune v. United States, 159 U. S. 590, 592, 16
Sup. Ct. 125, 40 L. Ed. 269.
- Transportation Line v. Hope, 95 U. S. 297, 24
L. Ed. 477.
- Spring Company v. Edgar, 99 U. S. 645, 25 L.
Ed. 487.
- Connecticut Mutual Life Ins. Co. v. Lathrop, 111
U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536.

- Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497.
- Northern Pacific Railroad v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.
- Texas & Pacific R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057.
- Gila Valley, etc. Ry. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276.
- St. Louis, etc. Co. v. Edwards, 24 C. C. A. 300, 78 Fed. 745.
- Western Coal & Mining Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329.
- Chicago Great Western Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423.
- Taylor v. Town of Monroe, 43 Conn. 36.
- Murray v. United States (C. of A., D. of C.), 288 Fed. 1008.
- American Agricultural Chemical Co. v. Hogan (CCA 1), 213 Fed. 416, 419.
- New York Life Ins. Co. v. Doerksen, 64 Fed. (2d) 240 at 241.
- Atchison T. etc. Co. v. Myers, 63 Fed. 793 at 796 (CCA 7).
- Ill. P. & L. Corp. v. Hurley, 49 Fed. (2d) 681.
- Hammond v. Woodman, 66 Am. Dec. 219, 235.
- United States v. Barker, 36 Fed. (2d) 556.
- D. & R. G. Ry. Co. v. Roller, 100 Fed. 738 (CCA 9).

E. AT MOST, THE ADMISSION OF THIS TESTIMONY CAN BE HELD TO BE DISCRETIONARY WITH THE COURT.

Gila Valley, etc. Ry. Co. v. Lyon, 203 U. S. 465,
27 Sup. Ct. 145, 51 L. Ed. 276.

Spring Company v. Edgar, 99 U. S. 645, 25 L.
Ed. 487.

United States v. Lumbra (CCA 2), 63 Fed. (2d)
796.

United States v. Barker, 36 Fed. (2d) 556.

F. ANOTHER REASON WHY NO PREJUDICIAL ERROR WAS COMMITTED IN THIS REGARD WAS THAT OTHER EVIDENCE OF THE SAME NATURE WAS ADMITTED WITHOUT OBJECTION.

United States v. Dudley, 64 Fed. (2d) 743.

Shwab v. Doyle, 269 Fed. 321 at 333.

Prevette v. United States, 68 Fed. (2d) 112.

G. THE DECISIONS CONTRA ARE UNSOUND.

Texas & P. R. Co. v. Watson, 190 U. S. 287, 47
L. Ed. 1057.

H. A RULE OF PRACTICE LONG INDULGED AND ACQUIESCED IN BY COURTS, ATTORNEYS AND LITIGANTS WILL NOT BE OVER-

THROWN EXCEPT FOR MOST COGENT REASONS.

United States v. Lawson, 50 Fed. (2d) 646
(CCA 9).

United States v. Dudley, 64 Fed. (2d) 743
(CCA 9).

United States v. Jensen, 66 Fed. (2d) 19
(CCA 9).

United States v. Francis, 64 Fed. (2d) 865
(CCA 9).

United States v. Messinger, 68 Fed. (2d) 234
(CCA 4).

United States v. Sorrow, 67 Fed. (2d) 372
(CCA 5).

United States v. Ellis, 67 Fed. (2d) 765
(CCA 5).

United States v. Tyrakowski, 50 Fed. (2d) 766
(CCA 7).

Asher v. United States, 63 Fed. (2d) 20
(CCA 8).

United States v. Thomas, 64 Fed. (2d) 245
(CCA 10).

United States v. Woltman, 57 Fed. (2d) 418 (C.
of A., D. C.).

ARGUMENT

I.

AN OBJECTION MADE AFTER A QUESTION IS ANSWERED IS TOO LATE AND AN EXPLANATION WHY A WRITTEN STATEMENT IS SIGNED IS NOT IMPEACHMENT.

The first assignment of error (Br. 20) relates to the fact that the appellee while on the stand testified that he had signed a statement at the time of discharge that he was in good health. This matter is touched upon in appellant's points and authorities under subdivision VI, found on pages 26 and 27 of the brief, and is touched on in the argument on pages 28 and 29 of appellant's brief.

A. THERE WAS NO PROPER RECORD MADE AT THE TRIAL.

The appellant cannot rely upon the fact that the trial judge refused to sustain the objection covered by assignment No. 1, because the objection was not made in time and there was not a motion to strike. The record shows that the following proceedings were had when the plaintiff was asked if he had signed the statement at the time of discharge:

“A. Yes. I did.

Q. Why did you do that?

A. I wanted to get home.

MR. SLAUGHTER (Attorney for Appellant): I object to that as an attempt to impeach the plaintiff's own witness.

THE COURT: Overruled." (Tr. 42.)

It will appear at once from the above that the witness was allowed to answer this question and no objection was made at the time, and further there was no motion to strike made, and since an objection had not been made to the question and the answer was in the record before an objection was made, the court could do nothing else than overrule appellant's objection and no motion to strike was made.

A leading case on this subject is that of *Seerie v. Brewer*, (Colo.), wherein the court said:

"At the trial plaintiff's counsel asked of one of his own witnesses a question, the answer thereto, defendants' counsel say, if favorable to the plaintiff, would tend to impeach his own witness. It is doubtful if the point has been properly saved. The general rule is that, if a party suffers an improper question to be asked without objecting thereto, he cannot thereafter be heard to complain of an unfavorable responsive answer. But there is no merit in the point if it has been properly saved. There was no attempt by plaintiff directly to impeach any of his own witnesses. The most that can be said of the question propounded by plaintiff's counsel

is that a favorable answer would have tended to contradict his witnesses, and this is permissible.”

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122 Am St. Rep. 1065.

In an Oregon case, a witness had testified to the effect that \$1,050 represented 3 per cent of the estimated cost of the city hall, and he was then asked:

“Q. Would you say that is a reasonable amount for the services you have rendered and performed?
A. Yes.”

An objection was then made and in passing upon the question the Supreme Court of Oregon said:

“The answer was clearly responsive to the question, and no objection was made to the question until it had been answered. After the answer was in the record, however, the defendant objected to the question and moved that the answer be stricken therefrom. This is not a case of an improper answer to a proper question, nor that of an answer that is not responsive to a proper question. Neither does it appear that the answer was made before counsel had time to object.”

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore. 18.

In an Iowa case, the Supreme Court of that State held:

“It will be observed that there was no objection to the questions until the answers were in. It was

just as apparent when the questions were asked as when they were answered that the evidence was incompetent, if it was so. The objection was therefore not timely, and the court could have overruled it on that ground.”

Parks v. City of Des Moines, 191 N. W. 728, 195 Iowa 972.

In an Alabama case the witness was asked, “Worked for the defendant, the Alabama Fuel & Iron Company?” and answered, “Yes, sir.” The record recites that defendant’s counsel then said, “Wait a minute. We object to the question on the ground it calls for immaterial, irrelevant, incompetent, and illegal testimony.” The court overruled the objection and the defendant duly excepted. This was but experimenting on the answer of the witness, and no error was committed in overruling same. Alabama Fuel & Iron Co. v. Minyard, 88 So. 145, 205 Ala. 140.

The Circuit Court of Appeals for the Fifth Circuit had a similar situation, wherein that court said of the trial court:

“The court is not chargeable with error in overruling an objection to a statement by a witness which was responsive to a question which was not objected to.”

Penix v. Sloan, 3 Fed. (2d) 258.

The Eighth Circuit Court also said:

“There was no objection to the testimony at the time it was given, but subsequently there appears in the record a statement that this notation was objected to for the reason that it was not shown that it was made at the proper time by the proper officer in due form. The objection made after the witness had testified amounted to nothing. Counsel’s remedy would have been a motion to strike out the testimony.”

Dinet v. Rapid City, 222 Fed. 497.

Ruling Case Law states the rule as follows:

“The purpose of an objection being to prevent a question from being answered until after a ruling of the court can be obtained, it is well settled that it is too late to interpose an objection after the question has been answered.”

26 R. C. L. 1046.

B. A COLLECTION OF WRITTEN DOCUMENTS IS NOT A WITNESS IN THE SENSE THAT SOME ONE OF THE DOCUMENTS CANNOT BE IMPEACHED.

It is contended by the appellant that the official service record was appellee’s own witness and therefore appellee could not contradict or explain the circumstances concerning the making up of said service record. This

service record included numerous papers such as the appellee's physical examination at the time he enlisted, the field medical card dated November 9, 1918, also some notations as to his physical condition while in the hospitals in France, and stated among other things that he was nervous while in the hospital in France and did not sleep, and that he had taken food which was contaminated with gas, and that vomiting and diarrhea followed, and the exhibit likewise contained several papers made up by the officers of the appellant at the time of the appellee's discharge from the army (Tr. 41). These records were made up and kept by the appellant's officers. The appellee had little or nothing to do with them.

It has always been our conception of the trial of a lawsuit that the purpose of all concerned should be to arrive at the truth of the issues involved, and that hypercritical objections should not be considered. It is perfectly obvious from the very statement of the case that this service record kept by the appellant was not a witness in the sense that appellant is now contending it is a witness and because it was merely a collection of written documents and appellee merely attempted to explain why he executed one of them.

For authorities holding that a document is not a witness in the sense that it cannot be impeached, we call attention to the following cases:

Eckermann v. McDonough, 186 N. W. 361
(Nebr.).

Henny Buggy Co. v. Patt, 73 Iowa, 485, 35 N. W. 587.

Peters v. Taylor (Ariz.), 251 Pac. 446.

C. A PARTY INTRODUCING A COLLECTION OF WRITTEN INSTRUMENTS DOES HAVE THE RIGHT TO EXPLAIN THE SAME.

Where a party introduced a hospital record, he was not bound thereby, merely because he had introduced it. Kelley v. Jordan Marsh Co., 179 N. E. 299. A party introducing an instrument wherein he had agreed not to bring a certain action was not bound thereby. Lyons v. Davy-Pocahontas Coal Co. (W. Va.), 84 S. E. 744. A party introducing statements by a doctor adverse to his position is not bound thereby. Independence Indemnity Co. v. Polk (Tex. Civ. App.), 14 S. W. (2d) 330.

Where a party introduced a hospital record which was contrary to his own testimony, the court held that he was not bound thereby, saying:

“The plaintiff was not bound by the hospital records even though he introduced them in evidence.”

Newman v. Levinson, 165 N. E. 122.

Where, in a suit trying a title, the plaintiff offered evidence of defendant's title, the court held that the plaintiff was not bound by such evidence. Gilliland v. Armstrong, 71 So. 700. Where a party introduces a deed supporting his adversary's title, he can explain and at-

tack the same. *Chrisman v. Gregory's Heirs*, 4 B. Mon. (Ky.) 474.

A case that we think is particularly applicable to the situation here is where a party introduces the books of account kept by an adversary and then attempts to explain certain items in the books of account. If the rule of law is that a party introducing a set of books of account cannot explain or impeach any item therein, justice would often be defeated, and in a case where the defendant introduced in evidence the books of a bank that was suing him and then proceeded to show certain errors, this was permitted, and the court draws the distinction between the fact that defendant was attempting to disprove certain items and what the situation would have been had he attempted to prove that the books were not actually the books of the bank, saying:

“We hold that the defendant, having introduced them, could not attack them by proof that they are not the books of the bank, and thus discredit them as a whole, but that it was competent to show errors in particular items; that is, it was competent to show mistakes or frauds in the entries, and thereby disprove facts which the books, on their face, purport to prove. If one introduces a witness, he cannot discredit him generally, but he may prove the truth of a particular fact, in direct contradiction to what his witness has testified.”

Merchants' Bank of Macon v. Rawls, 7 Ga. 191, 50 Am. Dec. 394. It seems to us that this is exactly the situation that we have here. In other words, the plaintiff having offered the official service record as the official service record could not contend that it was not the service record, but he could explain any entry contained in the service record and could contradict any particular statement contained therein, and certainly could show the circumstances under which any particular instrument or document was made up. See also Hoffman v. Hendricks (Okla.), 96 Pac. 589; Peters v. Taylor, (Ariz.) 251 Pac. 446. Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 35 L. Ed. 371.

In conclusion, we submit that the discharge of the plaintiff from the United States Army after he had served for practically two years and had been in a great war and in a foreign country, the fact that he was being discharged from defendant's army after a long absence from his native country and his home are facts which in themselves create a situation which is the proper basis and reason for the rule of law permitting the veteran to explain why he signed the formal statement at discharge. While such circumstances may not constitute duress as we ordinarily understand it, as a matter of fact it is difficult to picture a situation where the legal principle of allowing an instrument to be explained on account of having been signed under duress is more applicable. These formal statements were signed without any particular thought on the part of either the officers who prepared

them and caused them to be executed, or on the part of the men who signed them. The appellee in this case was an enlisted man; he was a battle casualty; his affliction was in the nature of a nervous and mental disability. His whole training in the army had taught him to do exactly as he was told by his superior officers: he was not to reason why, but to do and die.

All these facts taken together, namely, the fact that appellee's training had been for the purpose of teaching him to do exactly as he was told by his superior officers, the fact that he had been away from home for a great period of time, the fact that neither he nor his superior officers who caused him to execute the formal statement gave any particular consideration to the effect thereof, the fact that he was anxious to get home, which can well be understood—all these together create a situation in which it was perfectly proper for the court to allow the witness to explain why he signed the formal statement immediately prior to his discharge.

D. THE CASES CITED BY THE APPELLANT ARE NOT IN POINT.

The appellant on page 27 of its brief cites the case of *Hickory v. United States*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170. This was a murder case and one John Johnson was called as a witness for the defendant and testified that the defendant Shade (not Hickory, the appellant) was at his house on Tuesday evening, but not again until Friday evening. He was then asked if he

had not stated to defendant's counsel that Tom Shade had been at his place on Wednesday and Thursday evenings also, but he answered that he had not and that the his place on Wednesday and Thursday evenings also, to

Thereafter Isaac Shade, one of the defendants, was called and asked whether his interpretation of Johnson's statement was to the effect that Tom Shade had been at his place on Wednesday and Thursday evening also, to which an objection was made which was sustained, and the Supreme Court said:

“As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown (citing cases) but proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law.”

We think that the reason for this rule is entirely apparent in that it would permit a party to call a witness solely for the purpose of impeaching him, thus getting evidence before a court or jury which is purely hearsay. Thus the fact of any importance in the Hickory case was, “Was Tom Shade at Johnson's place on Wednesday and Thursday evenings?” When Johnson was called he testified positively that Shade was not there; then under this situation for the court to have permitted Tom Shade to say that John Johnson had at another time

said that Shade was at Johnson's place on Wednesday and Thursday nights would have been to introduce Johnson's unsworn statement to prove a fact that he had directly and positively testified did not exist, and that is the reason the Supreme Court said that such evidence did not amount to substantive evidence.

The next case cited by the appellant is that of *Fong Lum Kwai v. United States*, 49 Fed. (2d) 19, decided by this court, and that case was a deportation case and involved the impeaching of a witness by a record containing contrary statements, and the exact rule as laid down by this court is as follows:

“It is a fundamental rule of evidence that a party cannot call a witness for the sole purpose of impeaching him by inconsistent statements alleged to have been made by the witness. *Hickory v. U. S.*, 151 U. S. 308, 309, 14 S. Ct. 334, 38 L. Ed. 170; *Cyc. Fed. Proc.*, vol. 2, paragraph 527. The only instances in which a party is permitted to introduce conflicting statements to destroy the probative effect of the testimony of a witness introduced by him is where he claims that he had been surprised by the adverse testimony of his witness and offers the conflicting statements to justify calling the witness and to eliminate, as far as possible, the effect of his adverse testimony. *Murray v. Third Nat. Bank (C. C. A.)* 234 F. 481.”

Obviously this case is not at all similar to the case here, because here the appellee admitted signing a declaration which was in the service record, but merely stated that the reason he signed it was because he wanted to get home, which statement was in explanation of his having signed such a statement, and it is therefore in no sense an impeachment of the service record.

The case of *Murray v. Third National Bank* (CCA 6), 234 Fed. 483 at 491, merely lays down the rule that one is not permitted to discredit the testimony of one's own witness by showing his contradictory statements, and then goes on to say:

“The Ohio statute does not in terms give the right to discredit by proof of contradictory statements, but only to ‘rebut by counter testimony.’ This was permissible, even as to one's own witness, without the statute. *Hurley v. State*, (46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161) *supra*; *Hickory v. United States*, *supra*.”

Thus here if the appellant is claiming that the service record is our witness and by introducing it we adopted it as our witness, we certainly, under the decision in the *Murray* case, had a right not to contradict the statement made therein, but to explain why the statement was made.

All of the other cases cited under subdivision VI found on pages 26 and 27 of appellant's brief are to the same effect, and since they are not in point here, we do not think that further comment on them is necessary.

II.

IT WAS NOT PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO STRIKE THE ANSWER OF MRS. SPENCER G. YOUNG.

The second assignment of error found on page 21 of appellant's brief does not correctly state the record. The assignment of error set out in the brief is as follows:

“Q. About how much of the time did he work on that job?

A. *We* worked perhaps two or three hours a day, etc.”

The record, however, as settled in the bill of exceptions is as follows:

“Q. About how much of the time did he work on that job?

A. He worked perhaps two or three hours a day.”
(Tr. 111).

In the argument of this assignment of error, found on pages 29 and 30, we find the appellant commits the same error and quotes the answer as being “we worked perhaps two or three hours a day.” Counsel states on page 30:

“We believe that this was an error and that the entire answer should have been stricken under the rule that an unresponsive answer should be stricken, especially when the answer is immaterial.”

Thus we see that the assignment of error, as well as the entire argument of appellant under this division of ap-

pellant's brief is not based upon the record, and for some reason appellant attempts to change the record in that it changed the word "he" (Tr. 111) to the word "we".

In order to get a full understanding of the actual record as it exists, we desire to call attention to the fact that Mrs. Spencer G. Young's testimony was taken by way of deposition (Tr. 107) and she was not present at the trial and she testified very fully as to Mr. Young's illness and work record (Tr. 107-116), and in regard to the particular work to which this assignment of error relates she had testified:

"Then his father engaged both of us to come and cook for his harvesting. His family had moved off the farm again and gone to town, and the agreement was that I should do the cooking and that he should help me with what I needed and do what light work he could during the harvesting. He remained on his father's farm at this time until the spring of 1925. We started on the farm in September, 1924. During this time I observed practically the same symptoms. He was irritable, easily upset. He didn't sleep. He would wake up in the night delirious. He scarcely ate at all, and he had to be very careful what he did eat. At night when he woke up his breathing would be labored. The difficulty in breathing would increase until he would wake out of breath and almost choke, and as soon as he would get his breath he would scream. I can't state definitely how much

he made on this job. During the month of harvest I was paid \$1.00 a day for my work, and I think he was paid 50c a day. After that there was no salary. We were just to live on the farm and take care of it. After the harvest he didn't receive anything in money, just the living for staying on the farm." (Tr. 110-111).

All of the above went into the record without objection by appellant and then the record shows:

"Q. About how much of the time did he work on that job?

A. He worked perhaps two or three hours a day, and I did part of the work, caring for the chickens and all the light work that it was possible for me to do.

MR. SLAUGHTER: I move that part of the answer with reference to what she did and she had to do be stricken. It is not responsive and further not material.

THE COURT: Overruled.'

Mr. Young worked perhaps two or three hours a day. I am sure it wasn't more. I did all the work I could to help him." (Tr. 110-111).

It will thus be seen that the witness was explaining an arrangement whereby she was to do the work of cooking and helping her husband look after the farm, and that she was paid \$1.00 a day for her work. This was the

situation of the record at the time that the motion to strike was made.

A. A MOTION TO STRIKE AS UNRESPONSIVE CAN ONLY BE MADE BY THE EXAMINER.

The situation that we have under this point in this case is that the deposition of Mrs. Spencer G. Young was being read by the attorney for the appellee, Mr. Worthwine (Tr. 107-108). Mr. Slaughter, the attorney for the appellant, made the objection that the answer be stricken as not responsive. The appellant's attorney, Mr. Slaughter, was not examining the witness at that time. Consequently the rule that an unresponsive answer can only be stricken by the examining attorney is applicable.

The Third Circuit in a recent case has held:

“The objection on the second ground, that the answer was not responsive to the question, was properly overruled, because the examiner alone had the right to object on that ground. *State v. d'Adame*, 84 N. J. Law, 386, 390, 86 A. 414; Ann. Cas. 1914B, 1109; *In re Dunahugh*, 130 Iowa, 692, 107 N. W. 925; *Merkle v. Bennington Township*, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666; *Jones v. New York Central, etc., Railroad Co.*, 46 App. Div. 470, 61 N. Y. S. 721.”

Page Steel & Wire Co. v. Blair Engineering Co., 22 Fed. (2d) 403 at 406; *Certiorari denied*, 276 U. S. 623, S. Ct. 303, 72 L. Ed. 737.

The Supreme Court of the State of California in a decision decided in 1924, Chief Justice Wilbur concurring, reviewed a number of decisions and arrived at the conclusion that it was reversible error for a trial judge to strike out an answer of the witness upon objection made by the opposite party on the ground that the answer was unresponsive and adopted the rule:

“The answer was not responsive, but that was not a ground for striking it out on defendant’s motion unless it was itself improper.”

See *Hirshfeld v. Dana*, 223 Pac. 451.

Jones on Evidence states the rule to be:

“The correct rule seems to be that the party adverse to the examiner has no absolute right to have an answer expunged from the record merely because it is irresponsive. If the answer is competent and pertinent, it is optional with the court to strike it or to permit it to stand. A denial of a motion to strike is not error.”

Jones Commentaries on Evidence, Second Edition, Volume 5, page 4523.

B. THE STRIKING OF THIS TESTIMONY WAS WITHIN THE DISCRETION OF THE COURT.

It will be borne in mind that this testimony was taken by deposition (Tr. 107). Counsel for appellant had

cross examined this witness at the taking of the deposition (Tr. 115), and knew long before the trial and long before the deposition was read what the answer of the witness had been to the particular question, but even with this advance knowledge of this answer did not make any objection to the answer of the witness until it had been read before the court and jury at the trial of the case and then made the motion to strike, the refusal of the court to do so being assigned as error (Tr. 111).

In this condition of the record, we believe that it was discretionary with the court to allow the answer to stand. As was said by Jones:

“If the answer is competent and pertinent, it is optional with the court to strike it or to permit it to stand. A denial of a motion to strike is not error. * * * And in any event if an answer, though not responsive to the question, is material and competent as evidence, it is largely within the discretion of the trial court to permit it to stand even over proper objection. Lack of responsiveness is not necessarily a ground for exclusion.”

Jones, Commentaries on Evidence, Second Edition, Volume 5, page 4523.

C. SINCE THE WITNESS WAS PERMITTED TO ANSWER THE IDENTICAL QUESTION IN THE SAME MANNER WITHOUT OBJECTION,

THE ALLOWING OF THE ONE ANSWER TO
STAND IS NOT PREJUDICIAL ERROR.

This particular witness had testified in other parts of the record about helping her husband do the work for which he was paid. For example, she stated:

“He was slow. He didn’t get his work done and as far as possible his brothers helped him do the work *and I helped him with some of the work.*” (Italics are ours). (Tr. 110).

This was testified to without objection, and again this same witness testified in regard to the particular work where the motion to strike in question was made as follows:

“Mr. Young worked perhaps two or three hours a day. I am sure it wasn’t more. *I did all the work I could to help him.*” (Italics ours). (Tr. 111).

Furthermore, in regard to this particular work, the two, that is the witness and the appellee, were hired to do the particular work in question (Tr. 110-111).

In the case of *United States v. Dudley*, 64 Fed. (2d) 743, decided by this Court, the question involved was whether the receiving of evidence as to the plaintiff’s pre-war success and his poverty following the war was admissible over objection, and in that case it appeared that considerable of the testimony went in without objection, and then when an objection was made, it was overruled

by the trial court, and this court held that the overruling of the objection was not error, saying:

“In any event, in view of other similar evidence received without objection no prejudice resulted from its admission.”

United States v. Dudley, 64 Fed. (2d) 743.

We urge that this is the exact situation here, and that since the appellant allowed this same witness to state several times that she had helped her husband in doing his work that it could not have been prejudicial error for the trial court to have refused the motion to strike in this one particular instance. Shwab. v. Doyle, 269 Fed. 321 at 333.

D. THE REFUSAL TO STRIKE MATERIAL EVIDENCE IS NOT ERROR, AND IF IMMATERIAL IS NOT PREJUDICIAL ERROR.

We urge that since we have abundantly established that the answer could not be stricken upon the motion of the adverse party and the only ground assigned for the motion was that the evidence was not material and responsive, that there was no such ground stated in the motion for the stricture of the evidence in question.

We think that whether the plaintiff did the work or his wife did it is highly material to the issues involved in this case, for the reason that where other people do the work for which the veteran is paid, it deals directly with the plaintiff's disability or inability to work.

See *United States v. Lawson*, 50 Fed. (2d) 646 (CCA 9).

However, the rule is clearly established that if the evidence is not material, the court's refusal to strike it could not work any prejudicial error.

The Eighth Circuit has held in a war risk insurance case:

“Complaint is made also that the appellee was permitted to show some statement of the insured as to his ability to work. Unless such statement was a part of the *res gestæ* or was an expression of his feeling it would not be admissible, but we think there was no prejudice resulting therefrom; likewise the government complains of evidence permitted to be introduced that a thirteen year old boy could perform work which the insured did. We think the government's position as to this is correct, and that such evidence had nothing whatever to do with the case, but likewise it seems to us it was entirely immaterial and could work no prejudice.”

United States v. Phillips, 44 Fed. (2d) 689.

Furthermore, a case will not be reversed for the admission of immaterial evidence which is otherwise admitted in the record without objection.

Walter v. Rowlands, 28 Fed. (2d) 687 (CCA 9).

Judicial Code, Section 269 amended; Title 28, Par. 391, U. S. C. A., Note 203.

E. THE AUTHORITIES CITED BY APPELLANT ARE NOT CONTROLLING.

Under this subdivision and in support of its position, the appellant cites Wigmore on Evidence. Mr. Wigmore states:

“Where the witness, either in a deposition or on the stand, goes beyond the scope of the question, and makes an answer not responsive, there is here nothing ‘per se’ wrong. If the answer includes irrelevant facts, they may be struck out, and the jury directed to ignore them; if it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for.”

2 Wigmore on Evidence (2d Ed.) Section 785.

This is the principle that we are contending for here, for the reason that it was material to the issues as to whether the appellee did the work or some one else did the work.

The case of *Marinoni v. State*, cited by the appellant on page 26 of its brief, merely lays down the general rule that where an answer is unresponsive and incompetent, it may be stricken out on motion, but the case does not hold that the party adverse to the examiner may strike out an answer merely because it is irresponsive.

III.

PREJUDICIAL ERROR CANNOT BE PREDICATED ON EVIDENCE THAT IS NOT OBJECT-

ED TO, NOR CAN ANY GROUND FOR REVERS-
AL BE URGED WHICH IS NOT STATED IN THE
OBJECTION.

Under subdivision VII (Appellant's Br. 27-28) it is stated that an opinion cannot be based on evidence which a witness has heard, and then on page 30 (Appellant's Br.) it is stated by appellant as follows :

“Dr. Lowe, as stated in assignment of error No. 3, testified that he had heard the testimony in this case and that he had ‘heard the testimony here’ of the plaintiff; that he had that history in mind and the facts narrated in the history; that based upon the testimony which he had heard and the definition as given to him, he had an opinion as to total and permanent disability and said what the opinion was.”

We earnestly submit that appellant is not borne out by the record in this regard. Dr. Lowe gave his answer upon the hypothetical question contained in the record (Tr. 120-139). Dr. Lowe had not only heard all of the testimony in the case, but he also heard the hypothetical question (Tr. 147). Dr. Lowe testified specifically that he had in mind the facts narrated in the history (Tr. 147), which was the history contained in the hypothetical question (Tr. 120-139).

It is also stated at the bottom of page 30 and the top of page 31 (Appellant's Br.):

“We submit that the overruling of appellant’s objection to the doctor’s opinion based and given entirely upon the evidence which he had heard in this case was error, the objection being to the effect that the question as put contains matters which were stricken from the record and invades the province of the jury.”

We again submit that appellant absolutely misconstrues the record in this case when it states that the doctor’s opinion was given “entirely upon the evidence which he had heard in this case,” for the reason that the doctor specifically testified that he had in mind the facts narrated in the history (Tr. 147).

On cross examination Dr. Lowe stated that he had tested appellee’s reflexes.

The next question on cross examination by the appellant was:

“Q. You took that into consideration in addition to what you saw, your observation of the witness and the evidence?

A. I did not.

Q. And the hypothetical question as put by counsel?

A. I did not.” (Tr. 149-150).

Obviously the doctor considered nothing but the hypothetical question in giving his answer for the question asked by appellant’s attorney was whether he took the

testing of the reflexes into consideration in addition to the hypothetical question.

The very objection lodged by counsel at the time Dr. Lowe was asked his opinion assumed that he was answering on the hypothetical question and not what he had heard in the courtroom, the particular objection being:

“MR. SLAUGHTER: I object to the witness answering that question because the hypothetical question, included in this question, was not based on a substantial statement of the facts, etc.” (Tr. 148).

At the time this objection was made, counsel knew very well that a hypothetical question had been read in the presence of Dr. Lowe, and that Dr. Lowe was basing his answer upon the facts stated in the hypothetical question. If this had not been the case why did not counsel urge the objection at the time that the doctor could not answer upon the evidence that he had heard in the courtroom? Why did counsel not demand that the hypothetical question be read, and further why did they recite in their objection that the hypothetical question was not based upon a substantial statement of the facts (Tr. 148)? Instead of saying that the hypothetical question did not contain a substantial statement of facts, why did counsel not object that no hypothetical question had been read to the doctor? Why did they not object at the time that he was giving an opinion on the evidence that he had heard in the courtroom rather than waiting until the case is ap-

pealed and then misquote the record, and contend as they do at the top of page 31 of their brief that the doctor's opinion was given "entirely upon the evidence which he had heard in this case"? On page 32 (Appellant's Br.) counsel state:

"We believe that the correct rule of law is that an opinion cannot be based on evidence which the witness has heard, but an opinion must be based upon a hypothetical question stated in conformity with the established rules of evidence."

If the appellant believes that the above quoted portion of the brief is the correct rule of law, why didn't they object on that ground, and why in their objection did they assume that a hypothetical question had been submitted to the doctor? The reason is perfectly obvious, and that is that Dr. Lowe was present in the courtroom at the time that the hypothetical question was read to Dr. Rigby (Tr. 120-139; 147-150).

We have too much respect for opposing counsel to charge this as a deliberate attempt to mislead this court, but do state that it must indicate the weakness of appellant's position in this case, else this grossly misleading argument would not be made.

However, there are so many reasons why the alleged error is not a ground for reversal that we will only discuss a few of them.

A. AN OBJECTION MADE AFTER A QUESTION IS ANSWERED IS TOO LATE.

It will be noted that no objection was made until after Dr. Lowe had answered that he had an opinion (Tr. 148). Since the question had already been answered and no motion to strike was made, it is obvious that the court could do nothing but overrule the objection. Counsel could not wait to find out whether the answer would be favorable or unfavorable and then make a general objection.

See *Penix v. Sloan*, 3 Fed. (2d) 258 (CCA 5).

Dinet v. Rapid City, 222 Fed. 497 (CCA 8).

26 R. C. L. 1046.

Alabama Fuel & Iron Co. v. Minyard, 88 So. 145,
205 Ala. 140.

Parks v. City of Des Moines, 191 N. W. 728, 195
Iowa 972.

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore. 18.

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122 Am.
St. Rep. 1065.

B. WHERE TESTIMONY IS ADMITTED WITHOUT OBJECTION, PREJUDICIAL ERROR CANNOT BE ASSIGNED THEREON.

It will be noticed that the only objection in regard to Dr. Lowe's testimony is that contained on page 148 of the record, which objection was made after the question had been answered, and no objection was made to any question propounded to Dr. Lowe before he had answer-

ed the same (Tr. 148-149), the exact record being as follows after the objection:

“Q. You say you have an opinion?

A. Yes, sir.

Q. What is it.

A. That he was totally and permanently disabled at the time he reached home.

Q. What in your opinion was the disease or diseases that made him permanently and totally disabled?

A. Shell shock and neurasthenia.

Q. Is that a subdivision of psychoneurosis?

A. It is.

Q. Do you have an opinion as to when Mr. Young became totally and permanently disabled?

A. Yes, sir.

Q. When was it?

A. I would place the date at the time he came home.

Q. In your opinion will he ever recover from this condition of total and permanent disability,

A. I don't think he will.” (Tr. 148-149).

Thus we see that all of the testimony which counsel now contends was so objectional went in without any objection being lodged and we take it that it is an elementary rule of law that prejudicial error cannot be based upon evidence which is admitted without objection.

Indeed the rule is that not only must an objection be made, but the specific objection that is urged on appeal must have been made at the time of the trial. In a case decided by the Third Circuit, it appeared that an objection had been made at the trial in regard to the introduction of certain Articles of Incorporation that there was better evidence available. On appeal it was urged that there were other objections going to the authenticity of the copy of the Articles of Incorporation, and the court said:

“This objection comes too late here, and will not be considered, for it is an established rule of law that when a party objects to the admission of testimony the objection must be specific, and not general, and in a proceeding in error the party objecting is confined to the objection stated at the trial. The rule that the objection must be specific and not general obtains, in order that the attention of the trial judge may be directed to the precise point of law intended to be raised by the objection, for it cannot be expected that a particular objection in the mind of counsel, thoroughly conversant with the case through previous study, will occur to the judge in the intricacy of the trial, although, if stated, he would readily perceive its force. The party objecting is, upon proceedings in error, confined to the objection stated at the trial, for the reason that the question of law raised by the specific objection made is the only one

ruled upon by the trial court, and it cannot be said that the court erred in respect to a matter not brought to its attention, and upon which it neither ruled nor was asked to rule.”

Lederer v. Real Estate, etc., 273 Fed. 933 (CCA 3).

See also:

Noonan v. Caledonia Gold Mining Co., 121 U. S. 393, 400, 7 Sup. Ct. 911, 30 L. Ed. 1061.

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299.

Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641.

Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779.

C. THERE WAS NO OBJECTION MADE AT THE TIME THAT THE DOCTOR WAS BASING HIS OPINION UPON THE EVIDENCE THAT HE HEARD.

The only objection lodged to Dr. Lowe's testimony is the following:

“MR. SLAUGHTER: I object to the witness answering that question because the hypothetical question, included in this question, was not based on a substantial statement of the facts and contained matter prejudicial and stricken from the record and it invades the province of the jury.” (Tr. 148).

Thus we see that at the time the objection was lodged, it was not urged that the doctor had not been asked a hypothetical question or that he was not basing his opinion

upon the hypothetical question contained in the record, but the very objection assumes that the doctor was giving his opinion upon the hypothetical question which had been propounded to Dr. Rigby (Tr. 120-139).

The vice of now urging an objection which was not made at the time is particularly apparent in this case, for the reason that had it been suggested that the doctor was not basing his answer upon the hypothetical question this matter could have been entirely cleared up and if necessary the hypothetical question again read to the doctor, although since he had heard it, it would have been a useless waste of the court's time to have repeated it.

Camden v. Doremus, 3 How. 515; 11 L. Ed. 705.

Burton v. Driggs, 20 Wall. 125, 133; 22 L. Ed. 299.

Continental Ins. Co. v. Fortner, 25 Fed. (2d) 398
(CCA 6).

This court has had occasion to pass upon this matter in a medical case, where upon appeal it was objected that the hypothetical question did not contain all the facts in evidence, and this court said:

“Error is assigned to the ruling of the trial court in permitting the defendant in error to ask a physician, called as an expert, whether, assuming the injury to the leg of the defendant in error to be such as was testified to by him, and that that injury was followed by atrophy and paralysis of certain muscles of the leg, that condition would be the result of

the injury. Objection was made on the ground that the question stated facts not in evidence and failed to state all the facts in evidence as to the physical condition of the defendant in error. It is now argued that the question so propounded left out of consideration the fact that soon after the accident the defendant in error had been taken ill with typhoid fever, on account of which he was confined in a hospital for a period of 94 days. That ground of objection was not suggested at the time when the testimony was offered, nor did the objection then made direct the attention of the court to any omitted facts or misstatement of facts. The objection was clearly insufficient to preserve the right of the plaintiff in error to urge the ground of objection which is now made.”

Twohy Bros. Co. v. Kennedy, 295 Fed. 462 (CCA 9).

The Second Circuit Court of Appeals has said:

“Counsel who object to a hypothetical question which, when printed, is a page and a half long (and which undoubtedly contains many assumptions which nobody disputes), on the ground that some of its assumptions are not supported by the testimony, should call the attention of the trial judge to the assumptions they object to, so that the question may be modified or the missing testimony supplied.”

Quaker Oats Co. v. Grice, 195 Fed. 441 (CCA 2).

See also:

22 C. J. p. 710, sec. 800.

Jones, Commentaries on Evidence, Second Edition,
Volume 3, p. 2452, sec. 1341.

Knight v. Overman Wheel Co. (Mass.), 54 N. E.
890.

Prosser v. Montana Central Ry. Co. (Mont.), 43
Pac. 81.

Williams v. Marini, 162 Atl. 796.

D. APPELLANT'S CASES ARE NOT IN POINT HERE.

The assignment of error No. 7 (Br. 27) contends that Dr. Lowe was compelled to weigh the evidence which was the province of the jury. Here again we find that the appellant is urging an objection which was not included in the objection made at the time of the trial (Tr. 148). The cases cited by the appellant in support of this position are certainly not in point.

In the case of *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73, no hypothetical question was asked the witness as was propounded to the witnesses in this case, and apparently an effort was made to have the doctor give an opinion based upon certain evidence contained in certain depositions and the Supreme Court merely held that this was not proper, but went on to say that since the doctor had testified that Hall was capable of doing business and executing a power of attorney that he could have said no

more had he been allowed to consider the evidence given by the defendants as well as that given by the plaintiffs, and that the defendants, therefore, received no possible injury from the ruling of the court, and that, therefore, the assignment could not be sustained.

The next case cited, *People v. Le Doux* (Cal.), 102 Pac. 517—no hypothetical question was propounded and the court further says:

“In thus pointing out what we conceive to be the best method for obtaining the expert opinion of a witness, we would not be understood as saying that every departure from that method involves error, necessitating the reversal of a case. Cases may arise where the facts upon which the opinion is sought are simple, salient, and few. If it be made to appear that the expert has heard the testimony by which those facts have been presented, it would not necessarily be held error that he was asked to state his opinion upon those facts, without a restatement of them.”

In *Manufacturer's Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, the doctor was asked to give an opinion as to the cause of death from having heard the testimony of those who had performed the autopsy.

In *Dunagan v. Appalachian Power Co.*, 33 Fed. (2d) 876, relied upon by the appellant, it appears that the witnesses were allowed to testify from having heard the evi-

dence and the court after saying that the questions were not in proper form went on to say:

“It appears, however, that the witnesses did not merely give their opinions and stop there. They testified in great detail as to the nature of the circuit breaker, what its ‘flying out’ indicated, and what should be done upon such an occasion, and why. In other words, they gave all of the facts upon which their opinions were based so completely that the jury could judge of their weight as well as if they had been based upon hypotheses embraced in proper questions. Under these circumstances, there can be no question that the error was harmless.”

In the case at bar counsel complain of Dr. Lowe’s opinion. Dr. Lowe gave the evidence upon which he based his opinion, saying:

“A. I base my diagnosis on the symptoms that have been given.

Q. What were those symptoms?

A. General weakness, palpitation of the heart, difficulty in breathing, diarrhea and constipation, mostly constipation since he was home, constant cold, fainting and weakness on exertion. In the mental field you have the difficulty to concentrate and it being hard to get any information from him; memory poor, sleep poor, easily startled, wakens in the night with a cry and often in a cold sweat, which

would indicate a very unstable nervous condition.”
(Tr. 154).

Even if the hypothetical question had not been propounded in this case and even if the record had been properly preserved, we think that the above explanation by the doctor as to his reasons for finding that the appellee was totally and permanently disabled would be a sufficient explanation. This is in line with the holding of this court in the recent case of *United States v. Francis*, 64 Fed. (2d) 865, wherein this court said:

“Where an expert states his opinion to the jury, it should clearly appear in the evidence, either by the statement of facts, in a hypothetical question addressed to him, or by the witness’ statement of the facts, known and observed by him or stated to him upon what facts he bases his opinion.”

Here Dr. Lowe had read to him a complete history of the case, but he gave his reasons based upon the facts in the case for finding the appellee to be totally and permanently disabled at the time of his discharge from the army.

This court has considered this matter in *Southwest Metals Co. v. Gomez*, 4 Fed. (2d) 215; 39 A. L. R. 1416 (CCA 9).

IV

APPELLEE’S WORK RECORD SINCE THE WAR IS NOT A BAR.

In this case we find that the appellee has done very little work, although he has tried almost every conceivable

type of work. There isn't any question in this case as to the permanency of the disease with which the appellee is suffering, and as we view the record, there isn't any question as to its totality, both concurring at a time when his policy was in force.

OCTOBER, 1918, TO MAY 3, 1919.

Appellee testified that sometime in October until he was discharged that he did no military duty whatsoever and spent his time either in a hospital or in a convalescent camp. He is corroborated in this by the service record (Tr. 41).

MAY 3, 1919, TO SPRING OF 1921.

There can be no question but that appellee was not on any payroll and did very little if any work from May 3, 1919, until the spring of 1921, except for one month in 1920 when he tried to work in sheep for 30 days. The first morning after his arrival home he helped his family with the chores and then attempted to load a wagon (Tr. 43). He came and stayed at the home of his father and mother (Tr. 42). This work hurt him and distressed him and he got weak and sat down. He did not finish loading the load because he was unable to (Tr. 43). He found it difficult for him to harness the horses properly or properly do any work. He had to avoid shoveling and the heavier work on the farm (Tr. 43). He attempted to plow for a week or so, but did not take care of the horses (Tr. 43). This condition continued also during 1920. When he returned home from the army he was pale and narrow-chested and had quite a lot of gray hairs.

When he attempted to work he became very pale and bits of perspiration came out on his brow and he would get off the wagon and lay in a horizontal position for some time (Tr. 84). He would go out in the field for a short time and then return to the house and lie down on the floor to rest (Tr. 117).

He helped a Mr. Hewitt with sheep for 30 days in the spring of 1919 or 1920 doing only the lightest kind of work (Tr. 72) but he "left that work because I couldn't do it, couldn't go on with it" (Tr. 80).

1921

The next work that the appellee attempted to do after he failed in the sheep work was for a Mr. Robinson in 1921. He worked for Mr. Robinson for about two and one-half months at \$60.00 a month, doing light work (Tr. 44-45). Mr. Robinson, the employer, testified that the appellee did not do the work as it should have been done, and that he slowed down during the day and became very slow (Tr. 100). That he always had a bad color, that he was pale and sallow and he ate mostly stale bread with sour milk and soft boiled eggs (Tr. 101).

In the fall of 1921 he hauled water for a threshing outfit for a Mr. Gruderjon. He received about \$100.00 a month for himself and team and he worked *six weeks* (Tr. 45). This is the work which counsel on page 15 and also on page 35 of their brief state was for *six months*.

1922

Worked for the J. B. Colt Company. He drove a salesman around in a car; worked on a commission basis and made probably \$50.00 a month, and he was living with his sister and mother. This work was occasional work (Tr. 45-46). About the middle of October, 1922, he took over the work of installing these lighting systems. He would hire helpers to do the work (Tr. 46). His brother, who was helping him install the lighting systems, found that the appellee was not sleeping at night and that he was sweating (Tr. 98), and it was his practice to get up and get hot bricks and put them on the appellee and rub his arms and abdomen (Tr. 99).

1923

In the summer of 1923, he shooed some grasshoppers away from a lettuce crop, but every time he worked he became weak and sick and had to lie flat on his back, so he didn't work. This was all the work he did in 1923, except that he tried to work for a laundry watching a dryer and polishing and cleaning the washers. He worked for about a week (Tr. 46-47). Mr. Nelson, for whom he worked on the laundry job, testified that he secured the job for the appellee who was to be the witness' helper. He was to fire and help take care of the boiler and pull clothes from the washers and clean and polish the machinery (Tr. 94), and in this regard he testified with reference to appellee:

“He was slow. He did not do the work. I did the work. He was discharged. When firing the boiler I saw he was pale and slow.” (Tr. 95).

The appellee only lasted a week on this job and during this time forgot the dryer and ran into difficulties (Tr. 47).

1924

He attempted to unload a few carloads of coal for the Gas Company, and he hired other men to unload the coal, and in this regard the appellee testified:

“ I would start unloading that heavy coal and would become weak and have to lie down and quit. I knew I was unable to do work of that kind. Someone else unloaded the coal for me, and I paid them. I don't have much idea what I made after what I paid out, possibly \$15.00 a month. I kept it just about three months.” (Tr. 47).

He did three months work between April and July for Leaman Randall. While attempting to do this work he became thin (Tr. 47-48). He did not get the work done on time because he was tired and unable to rise and prepare for work in time (Tr. 48). He did not work in the field all day. He was discharged from this job sometime the latter part of July when the harvesting work came on (Tr. 48).

Mr. Randall, the employer, testified that he paid the appellee \$55.00 a month and the appellee boarded himself, and in regard to the appellee's work he testified:

“He was rather irregular in his work. Sometimes he would lay off and not come to work. The hard work I had to do myself or have another man do it. I know about his leaving my place for the purpose of going to see a doctor. He moved slowly. He did not follow my instructions with regard to mowing hay and quit before he finished the job. He didn’t finish the back swathes. The plow team stopped one day, and I found him lying on the soft ground on his stomach. I went to him. He looked pale and complained of pain in his stomach at that time.” (Tr. 88).

Another witness testified concerning this work for Mr. Randall:

“I was living with him on that farm and saw him work on that farm. He was slow. He didn’t get his work done, and as far as possible his brothers helped him do the work, and I helped him with some of the work.” (Tr. 110).

SEPTEMBER, 1924, TO SPRING OF 1925.

After leaving the Randall place, the appellee and his wife moved to the appellee’s father’s farm, where appellee’s wife was engaged as a cook and the appellee was to help her. During the month of harvest the appellee’s wife was paid \$1.00 a day and the appellee 50c a day, and after that there was no salary. He was nervous, he didn’t sleep, he didn’t eat, he was thin, he was slow in

moving around if he was working (Tr. 107-111). He was irritable, easily upset, he didn't sleep, he would wake up in the night delirious, he scarcely ate at all, and at night when he woke up his breathing was labored; the difficulty in breathing would increase until he would wake out of breath and almost choke and as soon as he would get his breath he would scream (Tr. 111). His wife did all the work she could to help him (Tr. 111).

1925 TO 1928

The appellee moved onto a farm adjoining his father's farm, and which his father had rented (Tr. 48). During this time he made less than \$100.00 the first year, and almost nothing the next year and perhaps \$50.00 the other years (Tr. 112). The first year his folks helped him. They put in the crop for him and helped him with his work all summer, and in the fall they did all the harvesting and put up his crops. The second year he hired a man, and the appellee did not do his work on the farm the second year, and he did not do his work on the farm the third year. The second year the hired man did practically all the work, and the third year they had a boy from the orphans' home and his neighbors and his folks helped him (Tr. 112). As one of his neighbors put it:

“We farmers helped him in that way, and if he didn't come it was all right, and if he did, it was all right.” (Tr. 93).

In 1925 he was in the Boise Hospital. In the fall of 1928 he attempted to work for the Sugar Company doing manual labor. He worked there a month or six weeks and he had a cold continuously (Tr. 49). He left this work to go to the Boise Hospital (Tr. 49). In addition his brother took the job and did the work half of the time, or nearly half of the time (Tr. 112).

1929

Worked for the Sunny Side Dairy. Worked about three months and found he couldn't do the work. He was nervous and dropped the bottles and broke them. His wife helped him with this work and the other men in the dairy also helped him (Tr. 49; 113). His employer at this work testified:

“At that time he looked much as he does now. He was slow in his movements, and at times I had other men help him in his work. We were equipped with carriers which did not require any heavy exertion on the part of any man to handle them (milk cans). He did not always make his run while he was there. I put another man in his place. * * * Sometimes I excused him from those runs and put another man in his place. As he continued with this work, I believe he grew a little bit slower. I practically discharged him. He didn't do in accordance with my orders, and the employment was terminated.” (Tr. 96-97).

He then went to the Boise Hospital (Tr. 113). He attempted peddling, but he didn't make more than \$10.00 or \$15.00 a month (Tr. 113).

1930

Metropolitan Life Insurance Company.

He lost weight all the time he was working for the Metropolitan Life Insurance Company. He had difficulty in breathing. He spent hours every night walking and sitting up, and he didn't eat. After leaving the Metropolitan Life Insurance Company he went to the Veterans Hospital for a month (Tr. 114). Mr. Green, his immediate superior, testified that he was assistant manager of the Metropolitan Life Insurance Company at Boise, and that the appellee worked there from March 3, 1930, until May 26, 1930, or less than three months. During this time, when he would come to work, appellee's eyes would be rather sunken in his head, he would appear to be rather fatigued as though under a strain; he didn't do the work that was assigned to him; he did not call on the families that were assigned to him each week (Tr. 103-104). While on this work the appellee collapsed (Tr. 104). He had a very bad cough and was very slow in his movements (Tr. 104). He lagged behind (Tr. 104).

The only other work that the appellee has done was in 1932 when he worked for two months or such matter for the Sugar Company at \$2.30 a day, measuring syrup (Tr. 51). This was work that a little girl had done (Tr. 78). During this time he did not work every day. He was

sick two or three days and off work during that time (Tr. 51). One night he had a very bad spell (Tr. 51). He was nervous and could hardly measure the syrup and he ran the syrup tanks over at times. They corrected his figures (Tr. 52).

During this time he was boarding with Mrs. Floyd Randall (Tr. 101), and she testified concerning him:

“Mr. Young didn’t sit down at the table and wouldn’t eat what we ate. He ate vegetables and fruit mostly. He was very thin and a real bad color. When he came home he would put his dinner bucket down and spend the evening fixing his boils. He called me before I went to bed several nights, and I went to him, and he was sitting up in bed and staring and muttering to himself. I rubbed his feet and hands, and his feet were cold like ice, and I put hot bricks around him. That occurred every few nights. I prepared his lunch bucket for him. I put in some raw carrots and boiled vegetables and cabbage and turnips. I didn’t put any bread in it—just vegetables. That is what he wanted me to put in.” (Tr. 101-102).

This was the condition that the appellee was in while doing the easiest kind of work for the Sugar Company. It will be borne in mind that this particular work was of the type that had been done by boys and girls (Tr. 78, 162).

The gist of the argument that appellee's work record is a bar is contained on page 18 of appellant's brief, wherein it is stated:

"The work record shows that plaintiff engaged in farming, herding sheep (Tr. 72), choring, cultivating, milking, feeding, cleaning ditches (Tr. 84, 85), weeding beets, plowing, water monkey (Tr. 45), driving a car, installing light plants (Tr. 75), working in laundry, unloading coal, general farming (Tr. 88), hauling potatoes (Tr. 89), picking potatoes (Tr. 91), figuring and estimating (Tr. 98), working in a sugar factory, delivering milk, insurance collector and homesteading. This work was not always steady but in many instances he kept on (Tr. 104, 106)."

The real facts, however, as it was well within the province of the jury to find, were that the appellee was merely attempting to work and to carry on, and that he did not follow any of the numerous things he attempted to do with any reasonable regularity, and actually worked a very small per cent of the time. We believe that we can be of most assistance to the court by taking all of the work referred to in appellant's brief as above quoted and showing the exact facts in regard thereto.

HERDING SHEEP.

Worked at this only thirty days and it was the lightest possible work in connection with the sheep (Tr. 72). Left

work at end of thirty days because he couldn't do it, couldn't go on (Tr. 80).

CULTIVATING.

Ran a cultivator at times for ten days or two weeks. He did not take care of his horses more than half of the time. He plowed only the time he felt like it, possibly one-half of the time during the week (Tr. 43).

CLEANING DITCHES.

"I had to avoid shoveling and the heavier work on the farm" (Tr. 43). He started to clean ditches. After he worked a short time, he put his shovel down and sat down on the ditch bank, was extremely pale and beads of perspiration were across his forehead (Tr. 84-85). He again attempted to help shovel and the same thing happened. He worked on this job possibly close to half an hour intermittently (Tr. 85).

WEEDING BEETS.

He went one-third the way up a row and then laid down in the row. The row was less than one-quarter of a mile long and took the others about fifteen minutes to a row. He was lying upon the ground, very pale, with beads of perspiration on his brow and having difficulty in breathing. He did not thin beets any more after that (Tr. 84).

WATER MONKEY.

He worked for about six weeks in 1921, receiving \$100.00 a month for himself and team, hauling two and sometimes three tanks of water a day for a threshing machine (Tr. 45).

DRIVING A CAR.

He drove a car for a short time for a salesman. He didn't have any salary, but worked on a commission. Worked three or four days at a time. When not working, he was staying with his sister and mother (Tr. 45-46).

INSTALLING LIGHT PLANTS.

Installed light plants for a short time in the fall of 1923. He had to get help to go and install them. He paid the helpers himself out of \$75.00 a month (Tr. 46).

WORKING IN LAUNDRY.

This was one week's work in the fall of 1923 (Tr. 46-47). His fellow employee, Nelson, said he did not do the work. He was discharged (Tr. 95).

UNLOADING COAL.

He was paid \$30.00 a car and out of this hired some one else to unload the coal. He possibly made \$15.00 a month for three months (Tr. 47).

GENERAL FARMING.

(a) Appellee tried farming for a Mr. Robinson in 1921, and Mr. Robinson, his employer, said that the work was not done as it should have been done. That he became very slow (Tr. 100). That he always had a bad color. That he was pale and sallow (Tr. 101).

(b) Worked for Leaman Randall in 1924 as a farm hand at \$50.00 a month and boarded himself. He became very thin (Tr. 47-48). He did not get the work done

in time because he was tired and unable to rise and prepare for work in time (Tr. 48). Did not work in the field all day. He was discharged after three months (Tr. 48). His employer testified that he was irregular in his work, he would lay off and not come to work. The employer did the hard work or had another man do it. That he left his place to go to a doctor. He did not follow instructions. He found him lying on the ground on his stomach (Tr. 88). Also the testimony was that he didn't get his work done and his brothers helped him do the work as far as possible and his wife helped him (Tr. 110).

(c) His own farming operations—1925 to 1928. His folks put in his crops. He had a hired man and he did not do the work on the farm (Tr. 112).

WORKING IN SUGAR FACTORY.

(a) In 1928 worked for a month or six weeks (Tr. 49). Had a cold continuously. His brother took the job and did the work half of the time (Tr. 112). Appellee left this work and went to the Boise Hospital (Tr. 49).

(b) In 1932 worked 2½ months, received \$2.30 a day for sitting and operating a lever (Tr. 51). He did not go to work every day, was sick two or three days, and off work during the time. He had a very bad spell (Tr. 51). He was nervous and could hardly measure the syrup and ran the tanks over (Tr. 52). This job was secured through a friend, Mr. Pierson, who was running the sugar mill (Tr. 77). He was doing the work that a little girl had done during the fall (Tr. 78).

DELIVERING MILK.

This work was done in 1929 for Carl Johnson (Tr. 49). Worked for about three months. He couldn't do the work. He was nervous and dropped the bottles and broke them. He left that work to go to the Boise Hospital (Tr. 49). His employer testified that appellee did not always make his run; that the employer put another man in his place and excused him from those runs. That appellee didn't do the work in accordance with his orders and that he was discharged (Tr. 97).

INSURANCE COLLECTOR.

Worked about three months in 1930, from March 3 to May 26. Had difficulty in breathing. Spent hours every night walking and sitting up, and didn't eat (Tr. 114). His immediate superior testified that he didn't do the work that was assigned to him (Tr. 103-104). That while on the work appellee collapsed (Tr. 104). He had a very bad cough and was slow in his movements (Tr. 104). That he lagged behind (Tr. 104). That he appeared fatigued and as though under a strain (Tr. 103). That he left this work to go to a hospital.

HOMESTEADING.

He put up a little piece of fence around his cabin, fencing in a few acres (Tr. 51). He hasn't attempted to grow anything except a few willows he planted around the edge of the water. He shingled his cabin, which is about ten feet by twelve feet (Tr. 51). His father put up his cabin for him (Tr. 78). He raised no crop. The cabin was

moved to the place already built. In fencing he had a boy helping him (Tr. 78).

Thus we see that the longest period that appellee was able to stay on any payroll was three months, and in every instance where he worked even approximately that length of time, his employer came on the witness stand and explained that he did not do even the lightest work satisfactorily.

We urge that the real, conclusive proof that the appellee was not able to work with any substantial regularity is contained in his actual payroll record, that is, when he was trying to work for his various employers at a monthly or weekly wage. An analysis of the evidence shows that over the period of time from 1919 up till the time of the trial he tried to work on ten different payrolls, and summarizing these various employments we find his actual payroll record is as follows:

PAYROLL

1. Herding sheep—
30 days in 1920. Couldn't do work; had to quit. (Tr. 80).
2. Mr. Robinson—
2½ months, \$60.00 a month—1920. Did not do work as it should have been done (Tr. 100).
3. Mr. Gruderjon—
6 weeks, \$100.00 a month, in 1921, for himself and team. Merely hauled two or three tanks of water a day (Tr. 45).

4. Laundry—
1 week in 1923. Discharged; fellow employees did the work (Tr. 95).
5. Unloading Coal—
3 months, \$15.00 a month, in 1924. Didn't do work (Tr. 47).
6. Leaman Randall—
1924—3 months, \$55.00 a month boarding himself. Didn't do work; discharged (Tr. 47, 48, 88, 110).
7. Sugar Company—
1928—6 weeks. Sick, went to hospital (Tr. 49). His brother did his work about one half of the time (Tr. 112).
8. Sunnyside Dairy—
1929—3 months. Missed time. Couldn't do work. (Tr. 49). Didn't do work in accordance with orders and was discharged (Tr. 96-97).
9. Insurance Company—
1930—3 months. Didn't do the work that was assigned to him (Tr. 103-105). Discharged. Went to hospital (Tr. 50).
10. Sugar Company—
1932—2½ months, \$2.30 a day. Missed time (Tr. 51). A little girl had done this work (Tr. 78).

From the above we see that from the time of his discharge up till the time of the trial, the longest time that

the appellee was on a payroll was three months; that at all times he was paid the meagerest kind of salary; that he never at any time performed his duties satisfactorily; that he repeatedly had help in his work and has never at any time performed his work satisfactorily.

We most earnestly urge that the medical testimony in this case, together with the plaintiff's own testimony, constitutes substantial evidence to support the verdict of the jury and that the only thing that the appellant can urge is that the record is so conclusive that it makes the medical testimony untrue.

However, the appellee has not made his own living, but has secured help at different times from the State of Idaho. (Tr. 79). It seems to us conclusive that the above work record instead of destroying the opinion of appellee's doctors that he was totally and permanently disabled from the time he went to the hospital in France, that it corroborates and supports the opinion of Dr. Rigby, who has known the appellee for thirty-five years and who testified from this personal knowledge (Tr. 118-119) that the appellee from the time of his return from the service was a sick man (Tr. 142), and that appellee did quit work or lose his jobs on account of his health. (Tr. 146).

We submit, therefore, that the appellee's efforts to work at any and every kind of employment and his repeated failure even at the lightest type of work is full, cogent, and complete refutation of the statement that

such a work record destroys the medical testimony in the case.

We think under this meager and broken work record that under no theory of the law could it be urged as a bar to appellee's right to recovery, and believe it is very similiar to the case of *United States v. Alger*, 68 Fed. (2nd) 592 (CCA 9). *Alger*, like the appellee here, was a farmer and this court in the *Alger* case said:

“Aside from his vocational training period, there is practically no work record, for he has not earned any substantial sums of money nor has the continuity or regularity of employment been such as to take him without the definition of total and permanent disability as set down by the courts. However, the work record is evidence for the jury to weigh.”

United States v. Alger, 68 Fed. (2d) 592 (CCA 9).

Also it is very similar to the case of *United States v. Dudley*, 64 Fed. (2d) 743 (CCA 9), except that in the *Dudley* case the appellee had one period where he was on a payroll continuously for sixteen months, but the evidence there as in this case was that the veteran was favored in his employment, that he could not eat or sleep, which is exactly the case we have here, and this court said:

“In most important respects, plaintiff's testimony was corroborated and substantiated not only by relatives but by friends, employees, and employers.

There was abundant testimony to the marked change in him after his return from the army, to the general physical disabilities which are set forth in his testimony, to his inability to work, to the fact that his condition has been practically unchanged since his discharge.

“* * * We do not weigh the evidence; what our verdict would have been as jurymen is immaterial. In our judgment, we cannot say that the jury could not reasonably find, as they have found, that at his discharge, plaintiff was totally and permanently disabled; that is that he was not only then totally disabled from following continuously a gainful occupation, but also that that condition was then reasonably certain to continue during his lifetime.”

United States v. Dudley, 64 Fed. (2d) 743 (CCA 9).

And this court in United State v. Rasar said:

“In United States v. Eliasson, 20 F. (2d) 821, 824, this court held that total disability does not necessarily imply incapacity to do any work at all, and in the course of the opinion it was pointed out that the work which the insured had performed ‘was intermittent and was continued only for brief periods, and invariably resulted in relapses which totally unfitted him for work.’ It was held that such unsuccessful efforts to work did not rebut an inference of total disability.”

United States v. Rasar, 45 Fed. (2d) 545 (CCA 9).

See also:

United States v. Jensen, 66 Fed. (2d) 19 (CCA 9).

United States v. Suomy, 70 Fed. (2d) 542 (CCA 9).

United States v. Lawson, 50 Fed. (2d) 646
(CCA 9).

United States v. Baxter, 62 Fed. (2d) 182
(CCA 9).

United States v. Burleyson, 64 Fed. (2d) 868
(CCA 9).

United States v. Francis, 64 Fed. (2d) 865
(CCA 9).

Fladeland v. United States, 53 Fed. (2d) 17
(CCA 9).

Storey v. United States, 60 Fed. (2d) 484
(CCA 10).

V.

THE EVIDENCE IS TO BE VIEWED IN THE
LIGHT MOST FAVORABLE TO APPELLEE.

We earnestly urge that since the only question in this case is one of fact, and since the facts have been determined in favor of the appellee by a jury, that the evidence is to be viewed in a light most favorable to appellee.

In the Albano case this court said:

“On appeal, we are required to view the evidence in the light most favorable to the plaintiff, where, as here, at the close of all the evidence, the defendant

made a motion for a directed verdict, which was denied by the court.”

U. S. v. Albano (CCA 9), 63 Fed. (2d) 677.

In the case of U. S. v. Dudley, this court said:

“The question before us is whether or not this evidence is so substantial as to justify submission of the case to the jury. We do not weigh the evidence; what our verdict would have been as jurymen is immaterial. In our judgment, we cannot say that the jury could not reasonably find, as they have found, that at his discharge, plaintiff was totally and permanently disabled; that is that he was not only then totally disabled from following continuously a gainful occupation, but also that that condition was then reasonably certain to continue during his lifetime.”

U. S. v. Dudley (CCA 9), 64 Fed. (2d) 743.

This rule of law is grounded upon the seventh amendment to the Constitution, and as this court in U. S. v. Leshner stated:

“Under the Seventh Amendment to the Constitution, a jury trial is guaranteed in a civil action; and that it is error to direct a verdict for defendant if there is any substantial evidence is stare decisis.”

U. S. v. Leshner (CCA 9), 59 Fed. (2d) 53.

See also Sorvik v. U. S. (CCA 9), 52 Fed. (2d) 406; U. S. v. Burke (CCA 9), 50 Fed. (2d) 653; Alaska Fish

Salting & By-Products Co. v. McMillan (CCA 9), 266 Fed. 26; U. S. v. Griswold (CCA 9), 61 Fed. (2d) 583; U. S. v. Lawson (CCA 9), 50 Fed. (2d) 646; U. S. v. Meserve (CCA 9), 44 Fed. (2d) 549; U. S. v. Scarborough (CCA 9), 57 Fed. (2d) 137; U. S. v. Rasar (CCA 9), 45 Fed. (2d) 545; U. S. v. Riley (CCA 9), 48 Fed. (2d) 203.

VI.

INCONSISTENCIES IN APPELLEE'S STATEMENTS AND CONDUCT WERE MATTERS FOR THE JURY TO DETERMINE AND ITS DETERMINATION IS FINAL.

On page 34 of its brief, the appellant states that on two occasions the appellee stated that he had no disability. The one, in regard to his condition at the time of his discharge, he explained by stating that he signed that statement because he wanted to get home (Tr. 42). It is next argued that when appellee applied for compensation on December 3, 1920, he stated that he had no disability at the time he was discharged from the army. In regard to the statement in his application for compensation that his disability began in 1920, the appellee testified that it was made out in typewriting; that he did not run a typewriter, and that the date of April, 1920, was a mistake and had reference to 1919 (Tr. 80). Furthermore, we desire to point out that in his application for compensation, the appellee stated:

“Question No. 13. Cause of disability: Gassed in France. Flat feet caused by carrying heavy pack on hard road.

Question No. 14. When and where received: Gassed October 20, 1918.” (Tr. 64).

Nature of disability claimed at that time was:

“Weakened condition of heart and stomach. Flat feet. Nervousness, rheumatism and general weakness.” (Tr. 64).

Appellant also argues that on January 29, 1927, in his application for a conversion of his insurance, the appellee stated that he was not then permanently and totally disabled. This, of course, was a mere conclusion on his part, and he did not know the meaning of total and permanent disability, and in this regard he testified:

“I did not start my suit sooner because after it lapsed I never had anybody draw my attention to the fact that I had a case. I was ignorant of the fact until I got talking to those in Boise. I think Mr. Hall told me. I did not know that I could sue on it. I had no idea about the definition of total and permanent disability.” (Tr. 52).

This statement not only explains why the appellee made the statement that he was not totally and permanently disabled in 1927, but is a clear explanation of the long delay which elapsed before he started his suit. However,

under the federal law, all of these points were for the jury to weigh.

As this court said in *United States v. Dudley*:

“While there was some conflict in the medical testimony concerning the X-rays, it was for the jury to determine which was right. It was likewise their province to weigh other inconsistencies, including plaintiff’s formal statement of no disability, at discharge.”

United States v. Dudley, 64 Fed. (2d) 743.

United States v. Albano, 63 Fed. (2d) 677 (CCA 9)

La Marche v. United States, 28 Fed. (2d) 828 (CCA 9).

And in regard to his application for a reinstatement of his yearly renewable term insurance (Exhibit No. 7, Tr. 69), we desire to call attention to the fact that this application was accepted only under Section 304 of the War Risk Insurance Act (Tr. 80), which is the same as Section 515 of Title 38, U. S. C. A., which provided generally that where the applicant’s disability is the result of an injury or disease suffered or contracted in the active military or naval service during the World War, that he may reinstate, *where the requirements of physical condition of the applicant have not been complied with*, by paying all back monthly premiums which would have become payable if such insurance had not lapsed, together

with interest at the rate of five per cent per annum, compounded annually.

THE CASES CITED BY APPELLANT ARE NOT CONTROLLING HERE.

The first case cited is that of *United States v. Kerr*, 61 Fed. (2d) 800. In the Kerr case, the only disability was that of a stiff knee, which obviously was not totally disabling, and has been so held many times. Furthermore, in the Kerr case there was an almost continuous work record. One period from 1925 to 1927 was 26 continuous months. Obviously, there is no such work record in this case, and the longest period we have in the case at bar is a period of about 3½ months in 1924, when the appellee was attempting to work for Mr. Leaman Randall. He received \$55.00 a month and boarded himself (Tr. 88), and as his employer testified, he was irregular in his work, he would lay off, and the employer said:

“The hard work I had to do myself or have another man do it.” (Tr. 88).

The next case cited is that of *United States v. Rentfrow*, 60 Fed. (2d) 488 (CCA 10). This was a tuberculosis case and the only medical evidence in the case was a doctor who advised the appellee to go to a hospital in 1922, and if he had done so, he would probably have become arrested; that is, that he did not believe at that time that the insured's condition was permanent. This was the only medical evidence in the Rentfrow case, and is

wholly unlike the case at bar, where we have the testimony of two well qualified physicians that the appellee's condition was permanent from the time that he was in the army and long before his insurance lapsed.

The next case cited, that of *United States v. Diehl*, 62 Fed. (2d) 343 (CCA 4), is clearly distinguishable, because the court on page 344 states:

“On the other hand, the conclusion from the evidence is inescapable that between 1918 and 1927 he was able to work and did work with reasonable regularity at substantially gainful occupations.”

While in the case at bar we find that the appellee did not work with any degree of regularity at any substantially gainful occupation. On the contrary the record shows that this veteran has received help from the State of Idaho through a fund provided for veterans that are not drawing any compensation and are out of funds (Tr. 79).

The next case cited is that of *United States v. Lawson*, 50 Fed. (2d) 646 (CCA 9). This is one of the outstanding cases in the United States where a recovery was allowed, although the veteran had been continuously on a payroll from the time of his discharge, but as in this case the evidence showed that other people had done the work for which the veteran received his pay, and that the veteran had expended money as in this case to have other people do the work.

The next case cited is that of *Nichols v. United States*, 68 Fed. (2d) 597 (CCA 9), which was a case of gunshot

wounds, and the case was decided on the point that the veteran had an almost continuous work record, and this court specifically stated that there was a partial permanent disability, but not total.

VII.

APPELLEE'S DELAY IN FILING HIS COMPLAINT WAS FULLY EXPLAINED AND IS NOT TO BE USED AS EVIDENCE AGAINST HIM.

On page 10 of appellant's brief, attention is called to the fact that the appellee in this case made a claim upon his war risk insurance on February 12, 1931. No point seems to have been made of this, however,, in the brief, and we assume for the reason that the appellee fully explained that it was only shortly before the demand was filled that he talked with a Mr. Hall, the Service Officer for the State of Idaho (Tr. 73), and that Mr. Hall told him that he could sue on it (Tr. 52), and that before that time he did not know that he could sue the United States (Tr. 52), and he had no idea about the definition of total and permanent disability used in war risk insurance (Tr. 52). We submit that the witness' explanation is clear and the evidence and explanation excuses and justifies any delay on his part in bringing his suit.

We urge that the Acts of Congress themselves, the practices adopted by the Bureau of War Risk Insurance, and the Report by Senator Shortridge's Committee furnished evidence that many veterans did not know of their right to sue.

In the first place, we believe that although a form of policy was prescribed by Bulletin No. 1, issued by the old Bureau of War Risk Insurance on October 15, 1917, no policy of war risk insurance was ever delivered to any member of our armed military forces.

In the second place, no receipts were ever issued to the men in our armed military forces for the premiums that were being automatically deducted from their service pay.

In the third place, we must bear in mind that the men who took out war risk insurance were in the military forces of the United States, their energies were being directed towards the prosecution of a war, and they neither had the time nor the facilities that would enable them to look into the contract that they had with their government.

In the fourth place, the little certificate evidencing the contract and that contained no definition of total and permanent disability was not delivered to the veteran himself, but if delivered at all was mailed to his beneficiary. In some cases, even this certificate showing that the insured had applied for insurance was never mailed from Washington. Furthermore, the definition of total and permanent disability which has now become embedded in our law and which is known as Regulation No. 11 was not announced until March 9, 1918, and was never given general publication, and at the close of the war the Bureau of War Risk Insurance absolutely broke down and failed to function.

In addition to all this, we believe that the Acts of Congress of the United States constitute ample evidence that veterans generally did not know of their right to sue. It is known that originally in the Sligh case, 24 Fed. (2d) 636, it was held that the statute of limitations applied to these cases, and immediately upon the 29th day of May, 1928, Congress extended the time for the presentation of claims and the filing of the action (C. 875, par. 1, 45 Stat. 964; Par. 445, Title 38, U. S. C. A.) and that again on July 3, 1930, Congress extended the time for the filing of demands and the filing of actions, (C. 849, Par. 4, 46 Stat. 992; Par. 445, Title 38, U. S. C. A.) and in the report of the committee having this legislation in charge, we find the following statements:

The report by Senator Shortridge from the Committee on Finance, dated June 9, 1930, and known as Report No. 885 of the 71st Congress, second session, to accompany calendar No. 906, on page 4 thereof, in discussing the amendment to Section 19 of the World War Veterans' Act of 1924, stated as follows:

“Section 4 of the bill also amends section 19 of the act by extending the time during which suits on insurance contracts may be instituted one year from the date of the approval of the amendatory act. Under the existing law, suits may be instituted within six years after the date the right accrued for which the claim is made prior to May 29, 1929, whichever is the later date. Certain exceptions are made in the

statute to protect the interests of minor and incompetent beneficiaries, and the running of the limitation period is suspended for the period elapsing between the filing in the Bureau of the claim sued upon, and the denial of said claim by the director. The committee is of the opinion that the further extension of time for filing suit—one year after the passage of this amendatory act—is warranted, in order that no veteran may be deprived of his right to enforce his contract of Government insurance merely because of lapse of time. It was pointed out to the committee by representatives of ex-service organizations that many men were not familiar with their right to bring suit until after the time limit in the existing law had expired.”

A reading of the briefs in the *Lumbra* case discloses that the attention of the Supreme Court was not called to this report.

Certainly it cannot be contended under the law that failure to bring an action promptly is at all conclusive, as the Ninth Circuit Court said in the *Hayden* case:

“Like comment may be made upon the suggestion that evidently plaintiff did not think he was totally and permanently disabled or he would not have waited ten years to assert a right under the policy. These are all considerations for the jury.”

Hayden v. U. S. (CCA 9), 41 Fed. (2d) 614.

VIII.

THERE WAS NO PREJUDICIAL ERROR COMMITTED IN ALLOWING DR. LOWE TO EXPRESS HIS OPINION AS TO APPELLEE'S TOTAL AND PERMANENT DISABILITY.

There are several statements in appellant's brief to the effect that Dr. Lowe first had to determine where the weight of the evidence was before he could express his opinion on the facts (Br. 31, 36). As we have already pointed out, Dr. Lowe gave his opinion upon the hypothetical question and not upon the evidence that he had heard. (See supra, page 64).

A. SINCE THE OBJECTION WAS MADE AFTER DR. LOWE HAD ANSWERED THE QUESTION, THE OBJECTION CAME TOO LATE.

Beginning on page 68, supra, of this brief, we have pointed out the fact that the objection to Dr. Lowe's testimony was made after he had answered that he had an opinion (Tr. 148). Since the question had already been answered and no motion to strike was made, it is obvious that the court could do nothing but overrule the objection.

Penix v. Sloane, 3 Fed. (2d) 258 (CCA 5).

Dinet v. Rapid City, 222 Fed. 497 (CCA 8).

26 R. C. L. 1046.

Alabama Fuel & Iron Co. v. Minyard, 88 So. 145,
205 Ala. 140.

Parks v City of Des Moines, 191 N. W. 728, 195 Iowa 972.

Bergholtz v. Oregon City, 240 Pac. 225, 116 Ore. 18.

Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122 Am. St. Rep. 1065.

B. WHERE TESTIMONY IS ADMITTED WITHOUT OBJECTION, PREJUDICIAL ERROR CANNOT BE ASSIGNED THEREON.

An examination of the record in this case shows that after the objection was made, the question was repeated and the answer was given without objection (Tr. 148-149).

Lederer v. Real Estate, etc., 273 Fed. 933 (CCA 3).

Noonan v. Caledonia Gold Mining Co., 121 U. S. 393, 400, 7 S. Ct. 911, 30 L. Ed. 1061.

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299.

Stebbins v. Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779.

C. THERE WAS NO SPECIFIC OBJECTION MADE AT THE TIME THAT DR. LOWE WAS REQUIRED TO WEIGH THE TESTIMONY, AND ANY OBJECTION ON THAT GROUND WAS WAIVED.

The only objection made to Dr. Lowe's testimony was:

“MR. SLAUGHTER: I object to the witness answering that question because the hypothetical

question, included in this question, was not based on a substantial statement of the facts and contained matter prejudicial and stricken from the record and it invades the province of the jury.” (Tr. 148).

The only possible ground under which this objection could be urged is that it comes under the invasion of the province of the jury, but since there was no specific objection made that the hypothetical question contained conflicting statements or required the doctor to weigh the evidence, this particular objection cannot be urged here.

See *Camden v. Doremus*, 3 How. 515, 11 L. Ed. 705.

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299.

Continental Insurance Co. v. Fortner, 25 Fed. (2d) 398 (CCA 6).

D. THE GIVING OF A MEDICAL EXPERT OPINION WAS NOT AN INVASION OF THE PROVINCE OF THE JURY.

As a preliminary matter, we desire to point out that in this case, the trial court clearly instructed the jury that the opinions of the doctors regarding appellee’s total and permanent disability was not an ultimate decision of the case and that it was not an invasion of the province of the court or the jury, but that it was in reality additional evidence bearing upon the question at issue, and that the opinions of the doctors were not in themselves a decision of the case, but that said opinions were merely additional

facts for the jury to consider in reaching a proper decision. The court instructed the jury as follows:

“I think I should say to you further that so far as the expert testimony given by the doctor witnesses is concerned, in response to the hypothetical question, you will consider and treat it in the same manner you will treat any other testimony in the case. The mere fact it was given by experts does not compel you to take that in preference to any other, but you should give it, all things being equal, the same consideration as that given to any other witness. The value of expert opinion depends not only on the qualifications of the expert witness but the facts he takes into consideration and upon which he bases his opinion. If the facts assumed and which are made the basis of his opinion are not established by proof, then the opinion would have no basis upon which to rest, and would be of no value, and, in weighing such opinion the jury must look to see whether or not the facts assumed are established by the proof or not. You cannot take the facts assumed to be true simply because they are so assumed, but you must look to the proof and say whether they are proved or not.”
(Tr. 176).

In the above instruction the jury were in substance told the following facts:

1. The opinions of the doctors were to be considered and treated as any other evidence.

2. The mere fact that it was given by experts did not compel the jury to take it in preference to any other.
3. That the value of the expert opinion depended upon :
 - (a) The qualifications of the expert.
 - (b) The facts that he took into consideration in giving his opinion.
4. That if the facts assumed were not established by proof, the opinion would have no basis upon which to rest.
5. That it was for the jury to determine whether the facts assumed were established by the evidence.
6. That the jury could not take the facts to be assumed simply because they were included in the question.

It will thus be seen that under this instruction that in no sense could it be contended that the expert opinion of the doctor was an invasion of the province of the jury. In a case decided by the Supreme Court of California involving the competency of a testator to make a will, a hypothetical question was asked and the opinion of the doctors expressed over the objection that it invaded the province of the jury, and the Supreme Court of California held:

“There is no merit in the contention that the objection should have been sustained because the question invaded the province of the jury by calling upon the witness to determine the ultimate question in issue. This question when answered by the witness still left for the determination of the jury at least all of the following questions: (1) The credibility of

the witness, (a) as to his skill and learning, (b) as to his honesty, impartiality, and fairness; (2) as to whether or not each of the assumed facts had been proven; (3) as to whether or not the facts assumed had been fairly selected from among the facts proven; (4) as to whether or not material facts omitted from the question had been proven.”

In re Russell's Estate, 210 Pac. 249.

We urge that the trial court in giving the above instructions placed every possible safeguard, in so far as the jury was concerned, around the opinion given by the expert.

In a very recent war risk insurance case decided by the Tenth Circuit Court of Appeals (April 10, 1934), the doctor had testified that a veteran was totally and permanently disabled upon his discharge from service, and the court said:

“In this case the jury had not only lay testimony but also medical testimony and it was for the jury to reach its conclusion after considering all of the testimony.

“In *United States v. Gower et al.* (CCA 10) 50 F. (2d) 370, 371, this court said:

“ ‘Moreover, expert testimony is only an aid to the solution of the main issue. It cannot be arbitrarily ignored or indolently accepted, and after it has been considered by the jury, if they believe their own experience, observations and common knowl-

edge, as applied to the facts in the case, will guide them to a solution and verdict, they have a right to follow their own convictions, thus reached, although in doing so their verdict may be contrary to the opinion evidence of experts on the subject.'

"The same principle is announced in *Carter v. United States*, 49 F. (2d) 221, from the Fourth Circuit."

United States v. Monger, 70 Fed. (2d) 361.

This is exactly in line with the instruction given by the trial court in this case.

A leading case on this point is that of *Runkle v. United States*, 42 Fed. (2d) 804 (CCA 10), which was a war risk insurance case. The doctor was asked in a hypothetical question whether in his opinion the veteran was able to carry on a substantially gainful occupation from November, 1918, until the date of his death. The trial court sustained an objection to the question, and later directed a verdict for the government on the ground that there was no direct evidence from which the jury might find that the deceased was permanently disabled in November, 1918. The Circuit Court of Appeals reversed the judgment for the defendant on the ground that the court erred in sustaining the objection to the hypothetical question, and said:

"The reason for the rule which permits experts to express an opinion upon the ultimate question, and

the authorities in support thereof, are exhaustively treated in *United States Smelting Co. v. Parry* (8 C.C.A.) 166 F. 407, 411. The opinion is by Judge, now Justice, Van Deventer. In that opinion, the court held that the rule which prohibits a nonexpert witness from testifying as to his opinions or conclusions 'never was intended to close any reasonable avenue to the truth in the investigation of questions of fact'; that the most important qualification of the general rule is the one which permits a witness possessed of special training or experience 'to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion; the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness.'

"Applying that rule to this case, we are of the opinion that the evidence should have been admitted. Whether tuberculosis is a progressive or a nonprogressive disease is a medical question; whether a particular case discloses a history of rapid or slow progress is a medical question. The evidence here disclosed a patient with tuberculosis in 1918; that he was bedfast in October, 1919; an advanced stage of cavitation in 1921 with complications; and death in 1923. Whether such a person was necessarily incapable of following a substantially gainful occupation in 1918 is a question upon which experts can render assistance to a jury. No rule can be laid

down applicable to all cases. The nature of the disease, and the time element, are both involved. Undoubtedly there are diseases where no honest opinion as to their past duration can be formed from a present examination; there are others where a definite opinion can be. But whether such an opinion can or cannot be formed is in itself a question for experts. In the case at bar we are of the opinion that there was error in excluding the evidence offered.” *Runkle vs. United States*, 42 Fed. (2d) 804 (CCA 10).

We submit that as a matter of principle and justice that the medical expert should be permitted to express his opinion as to whether or not the veteran at any particular time under these policies was totally and permanently disabled. One of the best statements of the reasons why this should be is contained in 11 R. C. L. beginning at page 583, wherein the author states:

“It has sometimes been decided, and often assumed to be an inflexible rule of law, that an expert cannot testify to his opinion upon the precise fact which is in issue before the jury. To permit that, it is said, would put the expert in place of the jury and invade their peculiar province. Thus, it has been held also that an expert may state that a certain cause may have produced the result under consideration, but cannot state that in his opinion it did produce it. But it is evident that this supposed rule, when stated

broadly as it often has been stated, involves great confusion of thought and leads to absurd consequences. It is certainly singular that a class of evidence which is admitted when it is only slightly pertinent should be rejected when it is of the highest pertinency. Irrelevancy is made a ground of admission, and relevance of exclusion. Such evidence invades the providence of the jury no more than does direct evidence of an eyewitness to a decisive fact. In either case, if the jury are satisfied of the trustworthiness of the evidence it may be conclusive of the issue; but their duty is no more invaded in one case than in the other. Every expert opinion rests on an assumption of facts; if an opinion is given upon a hypothetical question, its weight depends wholly on the jury finding that the assumed facts have been proven; if it is based on the experts own testimony as to the facts, the truth of this testimony is no less open to their belief or disbelief; and in addition, the soundness of the opinion itself is to be determined by the jury in consideration of its apparent reasonableness or their confidence in the skill and trustworthiness of the witness, and of any contradiction from other experts. The rule leads to absurd results in its application. Thus it is held that an expert may testify to the value of land before an alteration and to its value afterward, and that the court must charge the jury that the difference in value is the measure of damages, but that the expert cannot express an

opinion as to the amount of damages. The technicality of the distinction is illustrated by the holding that the facts may be elicited from the witness from which the ultimate conclusion inevitably follows, though that conclusion cannot be stated. The court in so declaring, however, admitted that the difference was largely one of form. And in many cases the courts have refused to recognize such a distinction and have allowed the witness to testify directly to the ultimate conclusion.”

11 R. C. L., page 583, paragraph 14.

The fallacy of the old statement that the province of the jury is invaded is clearly explained by Dean Wigmore in his work on evidence, and after stating that a phrase, often put forward as explaining why the testimony is excluded, is that if the witness were allowed to express his opinion he would be “usurping the functions of the jury”, goes on to say :

“In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to ‘usurp’ the jury’s function, nor could if he desired. He is not attempting it, because his error (if it were one) consists merely in trying to get before the jury a piece of testimony which ought not to go there; and he could not usurp it if he would, because the jury may still

reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own. That there is no hidden danger of 'usurpation' lurking here, and no need of invoking sentiment to repel it, will be clearly seen if we remember that the improper evidence is equally inadmissible before a judge sitting without a jury. Whatever the organization of the tribunal, it is not to waste its time in listening to superfluous and cumbersome testimony."

4 Wigmore on Evidence (2d Ed.) Sec. 1920.

And referring to the objection to opinion evidence that it must not be received when it touches the very issue before the jury, Dean Wigmore says:

"Another erroneous test, prevalent in some regions and nearly allied to the preceding one, if not merely another form of it, is that an opinion can never be received when it touches 'the very issue before the jury' * * *

"The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said,

it remains simply one of those impossible and misconceived utterances which lack any justification in principle:

“1845. Messrs. Carrington and Kirwan, note 1 C. & K. 313: ‘It seems to be a mistake to say that, in putting such a question to the witness as was put in the above case of *Fenwick v. Bell* (whether a collision could have been avoided by proper care) you submit to his decision a point which the jury alone can try. On the contrary, it is submitted that the object of putting the question is not at all to decide upon the fact itself, but to prove an entirely new fact namely, the opinion of a person of competent skill as to what might or might not have been done by the parties under a given state of circumstances. The jury are of course to decide upon the value of this opinion, as well as upon the value of the evidence on which it is founded; and thus it is plain that in the end the whole matter is submitted to their consideration, and that the only effect of the opinion will be to assist them in judging of a question of which the witness may reasonably be supposed, on account of his professional knowledge, to have been more competent to judge than themselves.’ ”

4 Wigmore on Evidence (2d Ed.) Sec. 1921.

The author of the note in 78 A. L. R. page 755 quotes with approval the statement we have heretofore set out from 11 R. C. L.

The leading case on this entire subject is that of *United States Smelting Co. v. Parry*, 166 Fed. 407 (CCA 8), where the court in an opinion by Judge, now Justice, Van Devanter, in discussing an objection to testimony by a practical brick mason and builder of many years' experience, to the effect that a scaffold constructed and supported like the one in question was not as safe as those usually provided in like situations, but was very dangerous, said:

“The objection made was, not that the witness was not qualified to speak as an expert, but that his opinion was elicited upon a matter which it was the province of the jury to decide, and which they were capable of deciding without such testimony. It is true that in trials by jury it is their province to determine the ultimate facts, and that the general rule is that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions. And it is also true that this has at times led to the statement that witnesses may not give their opinions upon the ultimate facts which the jury are to decide, because that would supplant their judgement and usurp their province. But such a statement is not to be taken literally. It but reflects the general rule, which is subject to important qualifications, and never was intended to close any reasonable avenue to the truth in the investigation of questions of fact. Besides the tendency of modern de-

cisions is not only to give as wide a scope as is reasonably possible to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts, and to disturb his decision admitting testimony of that character only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue and was calculated to prejudice the minds of the jurors. . . .

“The most important qualification of the general rule before stated is that which permits a witness possessed of special training, experience, or observation, in respect of the matter under investigation, to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion; the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness. A reference to adjudicated cases will show the extent of this qualification, its application in actual practice, and the discretion accorded to the trial judge in that regard. In *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477, there was called in question a ruling of the Circuit Court whereby a witness of large experience in towing vessels was permitted to testify that in his opinion it was not safe or prudent for a tugboat in Chesapeake Bay to tow three boats abreast, with a high

wind; that being the point to be decided by the jury.”

United States Smelting Co. v. Parry, 166 Fed. 407
(CCA 8).

The Eighth Circuit Court in considering a medical case reversed the trial judge for sustaining an objection to certain questions asked the doctors on the ground that they were invading the province of the jury, and said:

“The court sustained objections to their testimony on the ground that the answers called for would invade the province of the jury. But if the questions propounded were such that the jury might not be capable of determining from the evidence, then it was proper that they should have the benefit of the opinion of an expert, even though the opinion went to the matter directly in issue. The purpose of a trial is to investigate the facts so as to ascertain the truth, and the modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness may be permitted to state a fact known to him because of his expert knowledge, even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by the jury.”

Cropper v. Titanium Pigment Co., 47 Fed. (2d)
1038, 78 A. L. R. 737.

Judge, now Justice, Van Devanter, in the Parry case, *supra*, cites many United States Supreme Court cases in support of his proposition that:

“Besides, the tendency of modern decisions is not only to give as wide a scope as is reasonably possible to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts, and to disturb his decision admitting testimony of that character only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue and was calculated to prejudice the minds of the jurors.”

Said cases being as follows:

Holmes v. Goldsmith, 147 U. S. 150, 164, 13 Sup Ct. 288, 37 L. Ed. 118; Williamson v. United States, 207 U. S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278; Alexander v. United States, 138 U. S. 353, 356, 11 Sup. Ct. 350, 34 L. Ed. 954; Moore v. United States, 150 U. S. 57, 60, 14 Cup. Ct. 26, 37 L. Ed. 996; Clune v. United States, 159 U. S. 590, 592, 16 Sup. Ct. 125, 40 L. Ed. 269.

In the case of *Transportation Line v. Hope*, commented on by Judge, now Justice, Van Devanter in the Parry case, *supra*, an expert was called, and the objection was made that it invaded the province of the jury. The Supreme Court of the United States said:

“The witness was an expert, and was called and testified as such. His knowledge and experience

fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. *It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases.*" (Italics ours).

Transportation Line v. Hope, 95 U. S. 297; 24 L. Ed. 477.

Judge, now Justice Van Devanter, then proceeded to review the following decisions in the Parry case:

Spring Company v. Edgar, 99 U. S. 645, 25 L. Ed. 487, involving the testimony of experts on the question of whether or not a male deer was dangerous at certain seasons of the year, and such expert testimony was admitted and upheld by the United States Supreme Court.

Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536, in which the admission of testimony of nonprofessional witnesses, based on their observation of his conduct, as to the mental condition of the insured was affirmed.

Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497, wherein the admission of testimony of experienced seamen to testify that under circumstances known to them, it was not the exercise of good seamanship or reasonable prudence to attempt to tow a disabled vessel out of a port of repair and safety and across Lake Erie, was sustained.

Northern Pacific Railroad v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977, in which the admission of testimony of physicians as to whether the examination of plaintiff's person was made in a superficial or in a careful and thorough manner was approved.

Texas & Pacific R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, in which the Supreme Court held that the answer of a qualified witness to the question whether or not if an engine conducted itself in a way particularly described, he would say there was anything wrong with it, was properly admitted.

Gila Valley etc. Ry. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, in which the testimony of experts on the question of whether or not a railroad track or a trestle with a buffer at the end of it was a reasonably safe place, was admitted in evidence.

St. Louis, etc. Co. v. Edwards, 24 C.C.A. 300, 78 Fed. 745, wherein it was held that the testimony of an expert in handling cattle as to the damage from their long detention in cars was admissible.

Western Coal & Mining Co. v. Berberich, 36 C.C.A. 364, 94 Fed. 329, in which the court sustained the admis-

sion of testimony of an experienced miner as to whether or not a certain room would be an ordinary safe place in which to work.

Chicago Great Western Ry. Co. v. Price, 38 C.C.A. 239, 97 Fed. 423, in which the court sustained the admission of testimony of a locomotive engineer showing that rough and uneven track had a tendency to jostle the pin out of a car coupling and thus to part a train.

Justice Van Devanter then quoted from Taylor v. Town of Monroe, 43 Conn. 36, where the Supreme Court of Connecticut said:

“The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.”

The United States Supreme Court, speaking through Mr. Justice White, in the case of Texas & P. R. Co. v. Watson, held it proper to have an expert on engines testify that a certain engine could start fires, and the expert was permitted to answer, and the Supreme Court held:

“The question was proper. The witness was foreman of the boiler department at the main shops of

the defendant, having to do with the building of boilers, and was in special control of the part of the shops which had to do with spark arresters. * * * Inasmuch as there was evidence to the effect that it is impossible, even with the use of the most effective spark arresters, to prevent the escape of sparks, a case was presented justifying the introduction of expert testimony to aid the jury in determining the ultimate fact whether an engine was in good repair and properly operated which conducted itself as the evidence tended to show this locomotive did. *Eastern Transp. Line v. Hope*, 95 U. S. 297, 298, 24 L. Ed. 477.”

Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. Ed. 1057.

See also:

Murray v. United States (C. of A., D. of C.), 288 Fed. 1008.

American Agricultural Chemical Co. v. Hogan (CCA 1), 213 Fed. 416, 419.

The Tenth Circuit Court in *New York Life Ins. Co. v. Doerksen*, where the point was what caused a death in a certain case, and expert testimony was admitted, said:

“Where the matter under inquiry is one on which certain persons by reason of training, observation, or experience possess expert knowledge which will be of aid to the jury in reaching a correct solution of the issues and is therefore properly the subject of

expert testimony, it is no objection that the opinion elicited from the expert is on an issue or point to be decided by the jury.”

New York Life Ins. Co. v. Doerksen, 64 Fed. (2d) 240 at 241.

E

AT MOST, THE ADMISSION OF THIS TESTIMONY CAN BE HELD TO BE DISCRETIONARY WITH THE COURT.

The tendency of some of the courts is not to disturb a verdict after expert testimony has been admitted, even though objected to at the time of its admission on the ground that the trial court is familiar with the locality in which the case is being tried, presumably familiar with the experience of the jurors drawn from that community, familiar with the qualifications of expert witness and the need for expert help in a particular case.

The United States Supreme Court in the case of Gila Valley Etc. Ry. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, said:

“In the cases of all the witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with the structures and the character of buffers mentioned in the evidence.

There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case.”

And in the case of *Spring Company v. Edgar*, 99 U. S. 645, 25 L. Ed. 487, the Supreme Court in speaking of this matter said:

“Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.”

Certainly a case like this is one requiring expert opinion and the question of total and permanent disability is a matter for expert opinion. In *United States v. Lumbr*a (CCA 2), 63 Fed. (2d) 796, later affirmed by the United States Supreme Court, the court said:

“For a layman or a petit jury to say that Lumbr’a’s supposed brain lesion or other injury caused by the explosion, though sufficient to produce attacks of dizziness and headaches, involved a condition which rendered it reasonably certain that disability would continue during lifetime, is indulging in mere guesswork. They and we manifestly know nothing about it, and the plaintiff’s case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a sub-

ject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced, and the plaintiff failed to establish his claim because it was lacking.”

In *United States v. Barker*, this court said that while some of the medical witnesses expressed the opinion that the infirmity was at least in part permanent, no one of them ventured to say that the disability was total.

United States v. Barker, 36 Fed. (2d) 556.

Atchison T. etc. Co. v. Myers, 63 Fed. 793 at 796 (CCA 7).

Illinois P. & L. Corp. v. Harley, 49 Fed. (2d) 681.

Hammond v. Woodman, 66 Am. Dec. 219 at 235.

D. & R. G. Ry. Co. v. Roller, 100 Fed. 738 (CCA 9).

F

ANOTHER REASON WHY NO PREJUDICIAL ERROR WAS COMMITTED IN THIS REGARD WAS THAT OTHER EVIDENCE OF THE SAME NATURE WAS ADMITTED WITHOUT OBJECTION.

Dr. Rigby testified that Spencer Young was totally and permanently disabled when he operated on him in 1923 within the definition used (Tr. 119-120), and this evidence went in without any objection whatsoever being

made, and then on a history he testified that he was totally and permanently disabled, and while the objection was made at the time that it invaded the province of the jury, this objection was made before the witness had answered and is not assigned as error (Tr. 139-142). Furthermore, the appellant produced an expert witness (Tr. 164), Dr. Foster, who testified that Spencer Young was not totally disabled (Tr. 168-169). We believe it is a rule that where other similar evidence is received without objection that no prejudice results from its admission. *United States v. Dudley*, 64 Fed. (2d) 743. *Shwab v. Doyle*, 269 Fed. 321 at 333.

Even in the *Prevette* case, in which the Fourth Circuit follows the *Sauls* case, the court said:

“We do not regard the error as prejudicial because physicians testifying for the plaintiff were also allowed, contrary to the ruling in the cited case, to express an opinion as to the ability of the deceased after his discharge from the army to follow continuously a substantially gainful occupation.”

Prevette v. United States, 68 Fed. (2d) 112.

G

THE DECISIONS CONTRA ARE UNSOUND.

The case of *United States v. Sauls*, decided by the Fourth Circuit, 65 Fed. (2d) 886, held by way of dicta that a witness cannot state whether in his opinion a veteran has been able to work continuously at any gainful occupation. The question was asked of a lay witness and

obviously a lay witness would not be qualified to give a medical opinion. Furthermore, the Fourth Circuit Court goes on the ground that the ultimate question on the totality of disability was whether plaintiff was able to follow continuously a substantially gainful occupation, and what is mean by continuously in the regulation is a question of law and the same is true as to what is to be deemed a gainful occupation.

However, the court goes on to state that the government did not preserve an objection and further said:

“In addition to this, we do not think that, under the peculiar facts and circumstances of the case at bar, the admission of this testimony could have affected the result.”

And the judgment appealed from was affirmed.

The court in laying down the rule that the answer to this question was an invasion of the province of the jury cited certain cases, which are not, we most earnestly urge, controlling in this type of case where a doctor is asked for his opinion, for the reason that none of them were medical cases.

The first case relied upon by the Fourth Circuit is that of *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 36 S. Ct. 668, 60 L. Ed. 1037. This case did not involve medical testimony, but did involve the question of whether certain hand holds or grab irons installed on railroad cars were sufficient to accomplish the purpose of the provisions of the Safety Appliance Act requiring

hand holds to be placed on the ends of cars used in interstate commerce. The particular objection in that case was "that it was not a question for expert testimony, but was a matter of common knowledge." The jury had inspected the cars and the trial judge rejected the testimony of the expert and the Supreme Court said:

"Without stopping to point out the inappropriateness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instruction given on the subject, concerning which no complaint is made."

So it appears that this case goes off on the question that the matter of inquiry was not the subject of expert testimony, and there is nothing in the case that says that if it had been a proper subject for expert testimony that the opinion of a doctor would have invaded the province of the jury.

The next case cited in the *Sauls* case is that of *National Cash Register Co. v. Leland*, 94 Fed. 502 (CCA 1). This was a non-medical case and involved a patent infringement. One witness testified that the omission of a connecting mechanism in a cash register was a "fatal fault", and the Circuit Court held that the word "fatal"

contained an inference which went beyond the province of an expert and the trial judge was right in excluding the testimony. The same witness, however, had not been permitted to testify that a certain part of the mechanism was the mechanical equivalent of another, and the Circuit Court said:

“It was proper, therefore, that a witness skilled in mechanics, and understanding the meaning of the term ‘mechanical equivalent,’ should be allowed to express to the jury his opinion of the relation of one machine to the other, subject to further direct examination and to cross-examination, in order to bring out more clearly the grounds of his opinion.” (Citing *Keyes v. Grant*, 118 U. S. 25, 37, 6 Sup. Ct. 974; *Bischoff v. Wethered*, 9 Wall. 812, 814). “This general proposition concerning expert testimony is, indeed, almost conceded, but defendants’ counsel seems to contend that the evidence excluded would not have been helpful to the plaintiff. A direct statement of equivalence from a competent expert, however, might well have been helpful to an unskilled jurymen unable to comprehend fully a statement of difference of detail.”

Thus we see that in this case proper expert testimony and opinion evidence were permitted.

The next case cited is that of *Safety Car Heating & Lighting Co. v. Gould Coupler Co.*, 239 Fed. 861 (CCA

2). This was a patent infringement suit, and the only expert evidence involved was as the court said:

“The record herein largely consists of the opinions of expert witnesses as to the meaning of words and phrases needing no definition; such testimony (if it can be given that name) is a volunteering of duties laid by law on jury or court, and should not be suffered. Opinion evidence, on the very point submitted for decision, is always incompetent.”

This is all that the court has to say about expert evidence. Obviously this was a non-medical case and there was no expert testimony, and therefore what the court has to say about opinion evidence was dicta.

The next case cited is that of *Castner Electrolytic Alkali Co. v. Davies*, 154 Fed. 938 (CCA 2). This case involved the cause of a certain explosion and witnesses were permitted over objection to answer what it was in their opinion that caused the explosion, and the court stated that this was improper, but the court went on to say:

“We are not satisfied, however, that the admission of the testimony objected to was harmful error. There was no dispute as to any material fact, and the opinions expressed were accompanied by such a statement of the reasoning which led to the witnesses’ ‘opinions’ that the answers were but arguments only, of the weight of which the jury was quite well able to judge.”

This case undoubtedly is an exemplification of the old rule which allows a witness to go on and state every single fact except the very obvious one that the jury needs. For example, the court says:

“It was competent for the experts to enumerate the various causes which might produce such a result, and, their attention being called to any facts in proof (such as diameter of pipe, condition of water, etc.), to state what bearing the existence of those facts would have upon the probability or improbability of one or more of those causes being operative at that time and place. But the final inference from all the facts in proof as to what was the cause which produced the explosion was one for the jury to draw upon consideration of those facts, illuminated by the experience of the experts.”

The next case relied upon by the Fourth Circuit is *Standard Fire Extinguisher Co. v. Heltman*, 194 Fed. 400 (CCA 6). The facts involved here the catching of a hand in the cogs of a pipe cutting machine. Defendant offered to prove that an inspector did not require any further protecting device upon this machine, and the court said that this was only an offer to show a vague and indefinite declaration of opinion, not upon the witness stand, and, so considered, was obviously inadmissible. The court then goes on and by way of dicta says:

“So far as the offer might have contemplated an opinion from the inspector as an expert on the wit-

ness stand, it called only for his conclusion as to the ultimate fact in issue before the jury, and, under familiar rules, could not be received."

This, of course, was clearly dicta, because the testimony was objectionable on the ground that it was hearsay and that was really the point upon which it was decided.

All of the rest of the cases relied upon by the Fourth Circuit are North Carolina cases, the first one being that of *Smith v. Board of Commissioners of Lexington*, 176 N. C. 466, 97 S. E. 378, in which case a man had been killed by electric current, and a witness was asked if he had any opinion as to the amount of voltage that did kill the intestate. An objection was made, and the court held that it was the province of the jury to pass upon the evidence and form a conclusion and not the witness, and from all the evidence in the case, it was possible for the jury to determine what the voltage was.

The next case is that of *Kerner v. Southern Ry. Co.*, 170 N. C. 94, 86 S. E. 998, which grew out of a controversy as to whether an engine had set a certain fire. The trial court had refused to let one of the defendant's witnesses testify as a fact that the fire could not possibly have started from a spark emitted from the smoke stack and boiler of the defendant. The court held that this was a question that the jury was empanelled to pass upon. It will be noted that the witness was asked to state as a fact and not give an opinion. Under some of

the decisions, an expert can give an opinion and cannot state as a fact. We think that the distinction is not good. However, it is what governs some of the decisions of the court.

The next case cited by the Fourth Circuit is that of *Deppe v. Atlantic Coast Line R. Co.*, 154 N. C. 523, 70 S. E. 622, which involved the burning of a dry kiln. This was another engine fire case, and where opinions were stated as to the nature of the fire, and the court said:

“The evidence admitted was not ‘expert testimony’ in any sense, as the facts are such that one person may as well draw conclusions from them as another. Neither can it be considered ‘a shorthand statement of a fact,’ a term used by McKelvey and other writers on opinion evidence. It was nothing more or less than the conclusion of a witness drawn from certain facts, which conclusion it was exclusively the province of the jury to draw.”

The court, however, goes on to state:

“There are cases in our reports where expert and nonexpert opinion evidence has been allowed, but all of them are easily distinguished from this.”

We submit that if any proof is needed as to the lack of investigation back of the reasoning in the *Sauls* case, all that it is necessary to do is to point out that the Fourth Circuit Court cited cases from the Supreme Court of

North Carolina, which hold that expert opinion evidence is not admissible in cases involving the setting of fire by a railroad engine when the exact question had been decided by the United States Supreme Court, and it was held by Justice White that such evidence was admissible.

See *Texas & P. R. Co. v. Watson*, 190 U. S. 287, 47 L. Ed. 1057.

The next case relied upon by the Fourth Circuit in the *Sauls* case is *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578. A witness was asked whether the plaintiff was careful while engaged in his work. The court merely held that this was not a matter for expert testimony; obviously not applicable to the situation that we have in war risk insurance cases.

The last case cited is that of *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432, which is another case involving the covering of certain cog wheels, and a witness was permitted to testify that said cog wheels should have been covered, and the court held that this was improper; obviously not at all in point here.

Another case decided by the Fourth Circuit is that of *Prevette v. United States*, 68 Fed. (2d) 112, in which over an objection of the plaintiff, a physician, testifying for the United States, was allowed to express the opinion, in answer to a hypothetical question based on the work record of the insured, that on October 28, 1918, the insured was not totally and permanently disabled. The Circuit Court, basing its opinion upon the *Sauls* case, held that this was error, but the court went on to say:

“We do not regard the error as prejudicial because physicians testifying for the plaintiff were also allowed, contrary to the ruling in the cited case, to express an opinion as to the ability of the deceased after his discharge from the army to follow continuously a substantially gainful occupation.”

No new authorities are cited in the *Prevette* case, and in our opinion the Fourth Circuit merely continues the error that it committed in the dictum contained in the *Sauls* case.

The case of *U. S. v. Bass*, 64 Fed. (2d) 467 (CCA 7) is one in which the trial judge excluded the opinions of two of the defendant's doctors as to whether the veteran was totally and permanently disabled. The trial judge permitted full inquiry as to the basic facts from which the conclusion was to be drawn and the appellate court upheld him without citing any cases. This would seem to indicate that the matter was in the discretion of the trial court.

The precise question asked by the government in the *Bass* case was as follows:

“Now, doctor, do you consider—would you consider—taking into consideration the insured's condition at the time he left your hospital, that he at that time was permanently and totally disabled, meaning that the insured was afflicted with some ailment of the mind or body that would reasonably be sure to continue throughout life, and totally disabled,

meaning such an ailment of the mind or body as to render the insured unable to follow a substantially gainful occupation.”

The objection was made that it invaded the province of the jury and also that it did not give the correct definition of total and permanent disability. We submit that a reading of the question shows that it was not based on the definition contained in the policy, that it was vague and ambiguous, that the proper definition of total disability was not given; further, the witnesses were not asked for their opinion.

H

A RULE OF PRACTICE LONG INDULGED AND ACQUIESCED IN BY COURTS, ATTORNEYS AND LITIGANTS WILL NOT BE OVERTHROWN EXCEPT FOR MOST COGENT REASONS.

For years now war risk insurance cases have been tried in this and other Circuits on the theory that it was proper to ask doctors their opinions as to whether the veteran was totally and permanently disabled under the terms of the definition of total and permanent disability contained in Regulation No. 11. These opinions were called for, not only by the attorneys for the plaintiff, but by the attorneys for the government as well, and so far as we know for a number of years no objection was made by the attorneys for either the plaintiffs or the defendant

on the ground that such opinions invaded the province of the jury. In fact, in the case of *United States v. Bass*, 64 Fed. (2d) 467 (CCA 7), the government asked these questions, but insisted on appeal that it was error for the court to refuse to permit the doctors to give their opinions in terms of the definition.

The records in the following cases decided by this court will show that the attorneys for the government asked this question of their medical experts and did not object to similar questions asked by the attorneys for the veteran :

United States v. Lawson, 50 Fed. (2d) 646 (CCA 9).

United States v. Dudley, 64 Fed. (2d) 743 (CCA 9).

United States v. Jensen, 66 Fed. (2d) 19 (CCA 9).

United States v. Francis, 64 Fed. (2d) 865 (CCA 9).

For cases where this was done in other Circuits, see :

United States v. Messinger, 68 Fed. (2d) 234
(CCA 4).

United States v. Sorrow, 67 Fed. (2d) 372 (CCA 5).

United States v. Ellis, 67 Fed. (2d) 765 (CCA 5).

United States v. Tyrakowski, 50 Fed. (2d) 766
(CCA 7).

Asher v. United States, 63 Fed. (2d) 20 (CCA 8).

United States v. Thomas, 64 Fed. (2d) 245 (CCA 10).

United States v. Woltman, 57 Fed. (2d) 418
(CCA D C).

While we do not urge that this practice was indulged in by attorneys for the respective parties over a great

number of years, still owing to the large number of cases that have been tried in recent years, it was indulged in in a great many cases without objection by either party, and in some districts undoubtedly was indulged in in so many cases and for so many years that it became the established practice of the courts to require such an opinion before the plaintiff could make a case. We do not think that it is necessary to sustain the admissibility of this type of evidence to rely on the proposition that long acquiescence and indulgence in an unsound rule of evidence will make it a sound rule, but we do urge that a practice long indulged in or indulged in by all of the parties in a great number of cases is a powerful argument in favor of the soundness of the rule that permits the evidence to be introduced.

CONCLUSION.

We submit that in so far as the admission of evidence is concerned that no objection was made in time; that the record was not properly preserved, and if it be held that the record was properly made at the trial that no prejudicial error was committed in admitting the evidence, and further that the meager work record disclosed by the evidence in this case emphasizes appellee's condition of total and permanent disability rather than disproves it, and that a case was made for the jury, and that there is substantial evidence to support the finding of the jury, and that under the rule that where there is substantial evi-

dence to support the verdict it must be affirmed, that this case should not be reversed, but that the verdict of the jury and the judgment of the court should be affirmed.

Respectfully submitted,

JESS HAWLEY,

OSCAR W. WORTHWINE,

Residence: Boise, Idaho,
Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit. ³

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a corporation,
H. P. SULLIVAN, E. H. BOYER and
A. F. STOWE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

FILED

MAY - 1 1934

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Appellees, E. H. Boyer and A. F.

Stowe:

J. W. KEHOE, Seward, Alaska.

In the District Court for the Territory of Alaska,
Third Division.

No. A. 643

O. KRAFT,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a corpora-
tion, H. P. SULLIVAN, E. H. BOYER and
A. F. STOWE,

Defendants.

AMENDED COMPLAINT.

Plaintiff, by leave of the court, files this his
amended complaint and alleges:

1.

That at all the times hereinafter mentioned the above-named defendant H. P. Sullivan was the duly appointed, qualified and acting United States Marshal for the Territory of Alaska, Third Division; and the defendant A. F. Stowe was the duly appointed, qualified, and acting United States Commissioner and ex officio Justice of the Peace in and for the Kodiak Precinct, Territory of Alaska, Third Division; and the defendant E. H. Boyer was the duly appointed, qualified, and acting deputy United States Marshal in and for said Precinct, Territory and Division.

2.

That the National Surety Company is a foreign corporation organized under the laws of the state of New York and doing business within the Territory of Alaska, which said company was at all the times hereinafter mentioned, and now is, surety for the official bond of the defendant H. P. Sullivan as United States Marshal.

3.

That the plaintiff above named has for many years resided [1*] in the town of Kodiak, Alaska, where he is now and for a long time past been engaged in the general mercantile business, including the buying and selling of furs. That plaintiff, for causes unknown to himself, has incurred the enmity and illwill of the defendants Sullivan, Boyer

*Page numbering appearing at the foot of page of original certified Transcript of Record.

and Stowe, and that said defendants in order to injure, harass, oppress, and humiliate the plaintiff and bring him into public disgrace, corruptly and maliciously conspired, combined, confederated, and agreed together to falsely charge and accuse plaintiff of the crime of violation of the Alaska game laws, and also to convict and punish him for the aforesaid offence, which said conspiracy and prosecution they carried out maliciously and without probable cause in the following manner, to wit: That on the 15th day of March, 1928, the above named defendant A. F. Stowe came to plaintiff's store in said town of Kodiak, Alaska, and demanded that plaintiff allow him to inspect the books and records of his purchase of furs, and threatened plaintiff with arrest if he refused so to do. That at the same time, plaintiff refused to allow said defendant to inspect his records. That on the 16th day of March, 1928, pursuant to said conspiracy the defendant E. H. Boyer came to plaintiff's store in said town and demanded that plaintiff allow him to inspect the books and records of his purchase of furs, and upon plaintiff's refusing so to do informed this plaintiff that he was under arrest and compelled plaintiff, against his will, to go with him to the office of defendant Stowe and detained him until a complaint, entitled in the United States Commissioner's Court for the Territory of Alaska, Third Division, Kodiak Precinct, was prepared and signed by the said Boyer and sworn to before the said Stowe, charging this plaintiff with the violation of Regu-

lation 21 of the Alaska Game Laws, which said regulation is one adopted by the Secretary of Agriculture under the authority of the Alaska [2] Game Law and provides in substance that each fur farmer or fur dealer shall allow any member of the commission, any game warden, or any authorized employee of the United States Department of Agriculture, at seasonable hours to enter and inspect the premises where operations are being carried on under the said regulations and to inspect the books and records relating thereto. That a copy of said complaint is hereto attached, marked EXHIBIT A, and made a part of this complaint. That neither of said defendants was at any of the times herein mentioned, a member of the Alaska Game Commission, a game warden, or an authorized employee of the United States Department of Agriculture, and that neither of said defendants was entitled to inspect the books and records of plaintiff under the authority of said regulation or at all.

4.

That after said complaint had been made, a warrant for the arrest of plaintiff was issued by said Stowe, a copy of which is hereto attached, marked EXHIBIT B, and made a part of this complaint, and delivered to said Boyer, who then under color and by virtue of his office and official position read the same to this plaintiff. That plaintiff thereupon entered a plea of "not guilty", when plaintiff was released upon his furnishing cash bail, and his trial was set, by the defendant Stowe, for the fol-

lowing day, to wit: March 17, 1928, such trial to be had before the said Stowe as United States Commissioner and ex officio Justice of the Peace in the town of Kodiak, Alaska. That plaintiff was ready and appeared for trial at the time and place fixed therefor, but the trial of his said cause was postponed by said defendants until the 19th day of March, 1928. That upon said day plaintiff again appeared for trial when said action was again postponed until the 30th day of March, 1928, when said action was dismissed at the instance of said defendants and entirely abandoned and terminated, and this plaintiff was then and there discharged, and the said [3] defendants have deserted and abandoned the said prosecution and the said prosecution on said warrant and complaint herein mentioned is completely ended.

5.

That by reason of the aforesaid acts of defendants, plaintiff has suffered great humiliation and has been greatly degraded and disgraced in public opinion, that he has been obliged to neglect his business and employ counsel to prepare his defense, for all of which he has been damaged in the sum of \$16,000.00.

6.

That all the acts herein mentioned except the dismissal of the cause aforesaid were done maliciously, without probable cause, and in direct violation of defendants' oaths, duties and obligations as such public officers and constitute a breach and a

violation of the official bond of said United States Marshall, which bond provides: "If the said H. P. Sullivan, by himself and by his deputies, shall faithfully perform all the duties of the said office of Marshal, then this obligation to be void; otherwise, to remain in full force and virtue". A copy of said bond is hereto attached, marked EXHIBIT C, and made a part of this complaint.

7.

That the aforesaid acts of said defendants, and plaintiff's detention, arrest, and imprisonment thereby, were unlawful, malicious, oppressive, cruel, and without probable cause, ground, or reason therefor, and the said case of violation of the game laws was wholly false, malicious, and unfounded, and was then and there, at all times, well known, by each and all of said conspirators, to be false, malicious and unfounded.

WHEREFORE, plaintiff prays judgment against the above named defendants for the sum of sixteen thousand dollars, besides the [4] costs and disbursements herein incurred.

(sgd) L. D. ROACH

L. D. ROACH

ARTHUR FRAME

L. V. RAY

Attorneys for Plaintiff. [5]

United States of America
Territory of Alaska
Third Division—ss.

L. D. Roach, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action, that he makes this affidavit of verification for and on behalf of said plaintiff; that he has read the within and foregoing amended complaint; knows the contents thereof, and that he believes the same to be true; that he makes this affidavit of verification for and on behalf of said plaintiff for the reason that the plaintiff is not at Anchorage, Alaska, the place where this affidavit is made, or within one hundred miles thereof.

L. D. ROACH

Subscribed and sworn to before me this 26th day of December, 1930.

(Notarial Seal)

J. L. WALLER

Notary Public for Alaska. My Commission expires
Feb. 17, 1934. [6]

"EXHIBIT A"

In the United States Commissioner's Court for the
Territory of Alaska
Third Division Kodiak Precinct at Kodiak
No. 282

United States of America

vs.

Otto Kraft

COMPLAINT

For violation of Section 21 of the Alaska Game Law

OTTO KRAFT is accused by E. H. Boyer in this Complaint of the crime of Violation of Regulation 21 of the ALASKA GAME LAW committed as follows, to-wit:

THE SAID OTTO KRAFT in the Territory of Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 16th day of March, 1928, at Kodiak, Alaska, then and there being, then and there did refuse to allow E. H. Boyer Deputy U. S. Marshal, to inspect the books and records of his purchases of furs under his Fur Buyers Licence No. 1431, during the period from March 1st, 1928 to March 16, 1928, as required under the Alaska Game Law contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

E. H. BOYER

United States of America,
Territory of Alaska—ss.

I, E. H. Boyer, being first duly sworn, depose
and say that the foregoing complaint is true.

E. H. BOYER

Subscribed and sworn to before me this 16th
day of March, 1928.

[Seal]

A. F. STOWE

U. S. Commissioner and Ex-Officio
Justice of the Peace.

At Kodiak, Alaska. [7]

“EXHIBIT B”

In the United States Commissioner’s Court for the
Territory of Alaska
Third Division, at Kodiak

United States of America
Territory of Alaska—ss.

The President of the United States of America to
the Marshal of the Third Division of the Terri-
tory of Alaska, or his Deputy, Greeting:

We command you to apprehend forthwith, Otto
Kraft Who is named in a complaint made on oath
before me this 16th day of March, A. D. 1928, by
E. H. Boyer if he be found in said District, for
the crime of Violation of Regulation 21 of the
Alaska Game Law as is more particularly set forth

in said complaint, and bring him before me to answer said complaint, and be further dealt with as the law directs.

HEREOF FAIL NOT, and make the return of this writ with your doings thereon.

Given under my hand and seal at Kodiak this 16th day of March, 1928.

[Seal]

A. F. STOWE

United States Commissioner and Ex-
Officio Justice of the Peace. [8]

“EXHIBIT C”

BOND—U. S. MARSHALS.

(Corporation)

KNOW ALL MEN BY THESE PRESENTS:

That we, H. P. SULLIVAN as principal, and NATIONAL SURETY COMPANY, a corporation created and existing under the laws of the State of New York, as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the full and just sum of Thirty-five thousand dollars, lawful money of the United States, to be paid to the United States; for which payment, well and truly to be made, the said H. P. Sullivan binds himself, his heirs, executors, administrators, and the said National Surety Company binds itself, its successors, and assigns, firmly by these presents.

Signed with our hands and sealed with our seals this 17th day of April in the year one thousand nine hundred and twenty-six.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH, That whereas, the President of the United States hath, pursuant to law, appointed the said H. P. Sullivan to be Marshal of the United States for the third division of the District of Alaska for the term of four years, commencing with the sixteenth day of February, 1926, as by a commission to him bearing date the sixteenth day of February, 1926, more fully appears.

NOW, THEREFORE, if the said H. P. Sullivan, by himself and by his Deputies, shall faithfully perform all the duties of the said office of Marshal, then this obligation to be void; otherwise, to remain in full force and virtue.

[Seal]

H. P. SULLIVAN

Principal

NATIONAL SURETY COMPANY

Surety

by Geo. J. Love

Its attorney in fact.

Signed, sealed, and delivered in the presence of

S. O. Casler

A. C. Dowling

As to Principal

S. O. Casler

A. C. Dowling

As to Surety. [9]

Attest

J. L. Reed

Attorney in fact for

National Surety Company

(Seal of National
Surety Co.)

[Endorsed]: "Filed in the District Court, Territory of Alaska, Third Division. Apr 26 1926. W. N. Cuddy, Clerk by L. B. Millard Deputy"

[Noted on Back]: The within bond is approved as to tenor and form and sufficiency of sureties.

CECIL H. CLEGG

United States District Judge.

[District Court Seal] [10]

United States of America

Territory of Alaska

Third Division—ss:

I, L. D. Roach, being first duly sworn, on oath depose and say:

I am one of the attorneys for the plaintiff, O. Kraft; I am over the age of twenty-one years, a citizen of the United States and reside at Anchorage, Alaska. That the attorneys for the defendants, National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, are J. L. Reed, W. N. Cuddy, and A. J. Dimond of the firm of Donohoe and Dimond; that the said J. L. Reed, W. N. Cuddy and A. J. Dimond reside at Valdez, Alaska; that at each of said places of residence, namely, Anchorage, Alaska, and Valdez, Alaska, is a United States Postoffice and between said places there is a regular service of the United States mail. That on the 26th day of December, 1930, I served the attached amended complaint upon the said J. L. Reed, W. N. Cuddy and A. J. Dimond by depositing in the post office at Anchorage,

Alaska, a full, true, and correct copy of the above-mentioned amended complaint, duly certified to be such true copy by me as one of the attorneys for the plaintiff, duly enclosed in envelopes with the postage prepaid thereon, and addressed as follows: Hon. J. L. Reed, Attorney at Law, Valdez, Alaska, Hon. W. N. Cuddy, United States Attorney, Valdez, Alaska,
Hon. A. J. Dimond, Attorney at Law, Valdez, Alaska.

L. D. ROACH

Subscribed and sworn to before me this 26th day of December, 1930.

[Notarial Seal]

J. L. WALLER

Notary Public for Alaska. My commission expires Feb. 17, 1934.

[Endorsed]: Filed Dec. 26, 1930. [11]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT NATIONAL SURETY COMPANY, A CORPORATION.

Comes now the above named defendant, National Surety Company, a corporation created and existing under the laws of the state of New York, appearing for itself only, in answer to plaintiff's amendment complaint herein, admits, denies and alleges as follows, to-wit:

I.

Referring to Paragraph I of said amended complaint, defendant admits the same.

II.

Referring to Paragraph II of said amended complaint, defendant admits the same.

III.

Referring to Paragraphs III and IV of said amended complaint, defendant admits that the plaintiff has for many years resided at Kodiak, Alaska, where he is now and for a long time past has been engaged in the general merchandising business, including the buying and selling of furs; and defendant admits that true copies of the complaint and warrant in the criminal action therein described are annexed to said amended complaint and marked respectively Exhibit "A" and Exhibit "B". Defendant denies the remainder of [12] said paragraphs III and IV of said amended complaint, and defendant is informed and believes and therefore alleges the facts with reference to the subject matter of said Paragraphs to be as follows:

On and immediately prior to the 15th day of March, 1928, defendant E. H. Boyer was reliably informed that a certain person, an alien and not a citizen of the United States of America, then residing at Kodiak, had bought and sold, and was then engaged in the buying and selling of the skins of fur bearing animals at Kodiak, Alaska, without first hav-

ing obtained a license so to do as required by the provisions of the Alaska Game Law, and that said person had sold at least one of said skins of fur bearing animals to the plaintiff in this action with the full knowledge on the part of the plaintiff that said person had bought and sold and was then engaged in the buying and selling of the skins of fur bearing animals in violation of the Alaska Game Law, and that the skin so purchased by plaintiff had been purchased and was being sold to plaintiff in violation of said Alaska Game Law; that defendant E. H. Boyer honestly and in good faith and upon proper and sufficient cause believing that the Alaska Game Law was being violated by said person, requested the defendant A. F. Stowe to ask the plaintiff for an inspection of his records of the plaintiff's purchase of furs; that the defendant A. F. Stowe thereupon and on the 15th day of March, 1928, went to plaintiff's place of business and requested plaintiff's clerk to permit him, the defendant A. F. Stowe, to see and inspect the plaintiff's records of the furs purchased by plaintiff shortly before said 15th day of March, 1928; that plaintiff's clerk refused to permit defendant A. F. Stowe to inspect said records, and thereupon defendant A. F. Stowe departed from plaintiff's place of business; that on the morning of the 16th day of March, 1928, defendant A. F. Stowe reported to defendant E. H. Boyer that the plaintiff's [13] clerk had refused to permit defendant A. F. Stowe to see the record of the furs purchased by plaintiff.

That *Thereafter* and on the said 16th day of March, 1928, the defendant E. H. Boyer went to plaintiff's place of business in the town of Kodiak and requested that plaintiff allow him, the said defendant E. H. Boyer to inspect the records of the purchase of furs by plaintiff; that the plaintiff refused permission to said defendant E. H. Boyer to inspect the record of furs purchased by plaintiff and thereupon and at the request of the defendant E. H. Boyer, the plaintiff proceeded to the office of the defendant A. F. Stowe, who then was and for some time theretofore had been the United States Commissioner and Justice of the Peace for the Kodiak precinct in the Third Judicial Division, Territory of Alaska. Upon arriving at said office the defendant E. H. Boyer, then and at all times theretofore fully and in good faith believing that he had a right under the law to inspect upon demand or request the plaintiff's said record of furs purchased by plaintiff, filed and made oath to a complaint in a criminal action, copy of which is attached to and made a part of the plaintiff's amended complaint herein; that thereupon the defendant A. F. Stowe, as such Commissioner and Justice of the Peace, having read said complaint, and fully and honestly and in good faith believing said complaint to state a crime against the defendant named therein, who is the plaintiff in this action, issued under his hand and seal of said Court, a warrant for the arrest of the plaintiff herein and directed the same to the defendant E. H. Boyer; that the defendant E. H. Boyer thereupon having re-

ceived said warrant for the arrest of the plaintiff herein, and the same being valid and fair on its face, the defendant E. H. Boyer fully and honestly and in good faith believed that said complaint and said warrant were both valid and legal in all respects, and that it was his duty under the law and requirements of said warrant to [14] arrest the plaintiff herein; and that a short time after he had received said warrant and under and by virtue thereof, the defendant E. H. Boyer did arrest the plaintiff herein; that thereupon and within a very few minutes thereafter the plaintiff posted cash bail for his appearance in said criminal action and was thereupon released from custody, and the trial of said action at the request of the plaintiff was set for the following day, namely, March 17th, 1928, that thereafter the trial of said cause was postponed from time to time, and was finally dismissed upon the motion of the plaintiff in said criminal action, namely, the United States of America.

In the bringing and filing of said criminal action, and in the making of said arrest, said defendant E. H. Boyer and A. F. Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law; and defendant A. F. Stowe, in receiving for file said complaint in said criminal action, and in issuing said warrant thereon, acted as a judicial officer and in the performance of his judicial duties and within judicial authority and discretion imposed and conferred upon him by law; that

neither of said defendants at any time had or was actuated by any malice or ill-will against the plaintiff herein; and in truth and in fact on the said 16th day of March, 1928, and for a long time prior thereto, said defendants E. H. Boyer and A. F. Stowe entertained very friendly feelings towards the plaintiff, and did not wish to cause him any harm or injury whatever.

That the defendant H. P. Sullivan at the time of bringing and prosecution of said criminal action hereinabove mentioned, was not present in the town of Kodiak, Alaska, and had no knowledge or information of or concerning said action until some time after the 30th day of March, 1928; that if the defendant E. H. [15] Boyer did exceed his power and authority as deputy United States Marshal in arresting the plaintiff as hereinabove stated, the said defendant E. H. Boyer was not authorized so to do by the said defendant H. P. Sullivan, nor were his acts with respect thereto in any manner ratified or confirmed by defendant H. P. Sullivan; and that if the said defendant E. H. Boyer did exceed his power and authority as a deputy United States Marshal in making and signing the complaint in said criminal action, or in making the arrest of the plaintiff as hereinabove set out, the said E. H. Boyer then and in that event acted in a personal and individual capacity, and not by reason of his official position as a deputy United States Marshal.

That the defendant H. P. Sullivan neither on the 15th or 16th days of March, 1928, nor at any

other time has he borne or been actuated by any malice, ill-will or enmity towards the plaintiff, and in truth and fact has he at all times been, and now is, on the utmost good terms with the plaintiff herein, and has always in the past entertained, and does now entertain friendship and good will towards the plaintiff.

IV.

Referring to Paragraphs 5, 6 and 7 of said amended complaint, defendant denies the same and the whole thereof, except that a copy of the official bond referred to in Paragraph 6, is attached to said amended complaint, marked Exhibit "C".

V.

That the sum of five hundred (\$500.00) dollars is a reasonable sum to be allowed this defendant for its attorney's fee in the above entitled cause.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed and that defendant recover its costs, [16] disbursements and a reasonable attorney's fee herein.

J. L. REED,

Attorney for defendant National Surety
Company, a corporation.

United States of America,
Territory of Alaska.—ss.

J. L. Reed, being first duly sworn, deposes and says:

I am the attorney of record for the defendant National Surety Company, a corporation, in the

above entitled action, and make this verification for and on behalf of said corporation, that this verification is made at Seward, Alaska, and for the reason that said defendant is a corporation and has neither officer or agent at Seward, Alaska, upon whom service of summons might be made or within one hundred miles thereof. I have read the foregoing answer, and know the contents thereof, and the same is true as I verily believe.

J. L. REED

Subscribed and sworn to before me this 11th day of July 1931.

[Notarial Seal]

RALPH REED,

Notary Public for Alaska.

My Commission expires Nov. 8, 1934.

[Endorsed]: Filed July 11th, 1931. [17]

United States of America,
Territory of Alaska.—ss.

J. L. Reed, being first duly sworn, deposes and says:

That I am the attorney of record for the defendant National Surety Company, a corporation, named in the above entitled action, I reside at Seward, Alaska. That the attorneys for the plaintiff in said action are L. D. Roach, who resides at Anchorage, Alaska, and L. V. Ray, who resides at Seward, Alaska; that in each of said towns is a United States post office, and between said places there is a regular weekly service of United States mails.

That on the 11th day of July, 1931, I served the

hereto annexed separate answers of defendant National Surety Company, a corporation, by depositing in the United States Post Office at Seward, Alaska, a full, true and correct copy of said Answer, certified to be such copy by me as attorney for said defendant, duly enclosed in *a* envelope with the postage prepaid thereon, and addressed to the said L. D. Roach at Anchorage, Alaska, and at the same time I did in like manner mail a full, true and correct copy of said Answer, certified by me in like manner, to said L. V. Ray, addressed to him at Seward, Alaska.

J. L. REED

Subscribed and sworn to before me this 11th day of July, 1931.

[Notarial Seal]

RALPH REED,
Notary Public for Alaska.

My commission expires Nov. 8, 1934.

[Endorsed]: Filed July 11, 1931. [18]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
H. P. SULLIVAN.

Comes now the above named defendant H. P. Sullivan, and appearing for himself only and not for his co-defendants, in answer to the plaintiff's amended complaint herein, admits, denies, and alleges as follows, to-wit:

I.

Referring to Paragraph I and II of said amended complaint, defendant admits the same.

II.

Referring to Paragraph III and IV of said amended complaint, defendant admits that the plaintiff has for many years resided at Kodiak, Alaska, where he is now and for a long time past has been engaged in the general merchandising business, including the buying and selling of furs; and defendant admits that true copies of the complaint and warrant in the criminal action therein described are annexed to said amended complaint and marked respectively Exhibit "A" and Exhibit "B". Defendant denies the remainder of said Paragraphs III and IV of said amended complaint, and defendant is informed and believes and therefore alleges the facts with reference to the subject matter of said Paragraphs to be as follows: [19]

On and immediately prior to the 15th day of March, 1928, defendant E. H. Boyer was reliably informed that a certain person, an alien and not a citizen of the United States of America, then residing at Kodiak, had bought and sold, and was then engaged in the buying and selling of the skins of fur bearing animals at Kodiak, Alaska, without first having obtained a license so to do as required by the provisions of the Alaska Game Law, and that said person had sold at least one of said skins of fur bearing animals to the plaintiff in this action with the full knowledge on the part of the plaintiff

that said person had bought and sold and was then engaged in the buying and selling of the skins of fur bearing animals in violation of the Alaska Game Law, and that the skin so purchased by plaintiff had been purchased and was being sold to plaintiff in violation of said Alaska Game Law; that defendant E. H. Boyer honestly and in good faith and upon proper and sufficient cause believing that the Alaska Game Law was being violated by said person, requested the defendant A. F. Stowe to ask the plaintiff for an inspection of his records of the plaintiff's purchase of furs; that the defendant A. F. Stowe thereupon and on the 15th day of March, 1928, went to the plaintiff's place of business and requested plaintiff's clerk to permit him, the defendant A. F. Stowe, to see and inspect the plaintiff's records of the furs purchased by plaintiff shortly before said 15th day of March, 1928; that plaintiff's clerk refused to permit defendant A. F. Stowe to inspect said records, and thereupon defendant A. F. Stowe departed from plaintiff's place of business; that on the morning of the 16th day of March, 1928, defendant A. F. Stowe reported to defendant E. H. Boyer that the plaintiff's clerk had refused to permit defendant A. F. Stowe to see the record of the furs purchased by plaintiff.

Thereafter and on the said 16th day of March, 1928, the defendant E. H. Boyer went to plaintiff's place of business in [20] the town of Kodiak and requested that plaintiff allow him, the said defendant E. H. Boyer to inspect the records of the purchase of furs by plaintiff; that the plaintiff refused

permission to said defendant E. H. Boyer to inspect the record of furs purchased by plaintiff and thereupon and at the request of the defendant E. H. Boyer, the plaintiff proceeded to the office of the defendant A. F. Stowe, who then was and for some time theretofore had been the United States Commissioner and Justice of the Peace for the Kodiak precinct in the Third Judicial Division, Territory of Alaska. Upon arriving at said office the defendant E. H. Boyer, then and at all times theretofore fully and in good faith believing that he had a right under the law to inspect upon demand or request the plaintiff's said record of furs purchased by plaintiff, filed and made oath to a complaint in a criminal action, copy of which is attached to and made a part of the plaintiff's amended complaint herein; that thereupon the defendant A. F. Stowe, as such Commissioner and Justice of the Peace, having read said complaint, and fully and honestly and in good faith believing said complaint to state a crime against the defendant named therein, who is the plaintiff in this action, issued under his hand and seal of said court, a warrant for the arrest of the plaintiff herein and directed the same to the defendant E. H. Boyer; that the defendant E. H. Boyer thereupon having received said warrant for the arrest of the plaintiff herein, and the same being fair on its face, the defendant E. H. Boyer fully and honestly and in good faith believed that said complaint and said warrant were both valid and legal in all respects, and that it was his duty under said warrant to arrest the plaintiff herein; and

that a short time after he had received said warrant and under and by virtue thereof, the defendant E. H. Boyer did arrest the plaintiff herein; that thereupon and within a very few minutes thereafter the plaintiff posted cash bail for his appearance in [21] said criminal action and was thereupon released from custody, and the trial of said action at the request of the plaintiff was set for the following day, namely, March 17th, 1928, that thereafter the trial of said cause was postponed from time to time, and was finally dismissed upon the motion of the plaintiff in said criminal action, namely, the United States of America.

In the bringing and filing of said criminal action, and in the making of said arrest, said defendants E. H. Boyer and A. F. Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law; and defendant A. F. Stowe, in receiving for file said complaint in said criminal action, and in issuing said warrant thereon, acted as a judicial officer and in the performance of judicial duties and within the judicial authority and discretion imposed and conferred upon him by law; that neither of said defendants at any time had or was actuated by any malice or ill-will against the plaintiff herein; and in truth and in fact on the said 16th day of March, 1928, and for a long time theretofore, said defendants E. H. Boyer and A. F. Stowe entertained very friendly feelings toward the plaintiff, and did not wish to cause him any harm or injury whatever.

This answering defendant H. P. Sullivan further positively, and not upon information and belief avers that at the time of bringing and prosecution of said criminal action hereinabove mentioned, he was not present in the town or village of Kodiak, Alaska, and had no knowledge or information of or concerning said action until some time after the 30th day of March, 1928; that if the defendant E. H. Boyer did exceed his power and authority as deputy United States Marshal in arresting the plaintiff as hereinabove stated, the said defendant E. H. Boyer was not authorized so to do by this answering defendant H. P. Sullivan, nor were his acts with respect thereto in any manner ratified or confirmed [22] by defendant H. P. Sullivan; and that if the said defendant E. H. Boyer did exceed his power and authority as a deputy United States Marshal in making and signing the complaint in said criminal action, or in making the arrest of the plaintiff as hereinabove set out, the said E. H. Boyer then and in that event acted in a personal and individual capacity, and not by reason of his official position as a deputy United States Marshal.

This answering defendant H. P. Sullivan further positively avers that neither on the 15th or 16th days of March, 1928, nor at any other time has he borne or been actuated by any malice, ill-will, or enmity toward the plaintiff, and in truth and in fact this answering defendant H. P. Sullivan has at all times been, and now is, on the utmost good terms with the plaintiff herein, and has always in the past entertained, and does now entertain, senti-

ments of friendship and good will toward the plaintiff.

III.

Referring to Paragraphs 5, 6, and 7 of said amended complaint, defendant denies the same and the whole thereof, except that a copy of defendant's official bond is attached to said amended complaint, and is marked Exhibit "C".

WHEREFORE having fully answered herein, defendant prays that plaintiff's complaint be dismissed, and that defendant recover of plaintiff his costs and disbursements herein incurred.

W. N. CUDDY,
DONOHOE & DIMOND,
Attorneys for Defendant H. P. Sullivan. [23]

United States of America,
Territory of Alaska—ss.

W. N. Cuddy, being first duly sworn upon his oath, says:

I am one of the attorneys for the defendant H. P. Sullivan, named in the above entitled action, and I make this affidavit for and on behalf of said defendant for the reason that said defendant is not present at Valdez, Alaska, or within one hundred miles thereof. I have read the foregoing answer, and know the contents thereof, and believe the same to be true.

W. N. CUDDY

Sworn to before me on this 8th day of July, 1931, in the town of Valdez, Third Division, Territory of Alaska.

[Seal]

ANTHONY J. DIMOND

Notary Public for Alaska. My Commission expires
February 13, 1933. [24]

United States of America,
Territory of Alaska—ss.

W. N. Cuddy, being first duly sworn upon his oath, says:

I am one of the attorneys for the defendant H. P. Sullivan, named in the above entitled action. I reside at Valdez, Alaska. The attorneys for the plaintiff in said action are L. D. Roach, who resides at Anchorage, Alaska, and L. V. Ray, who resides at Seward, Alaska. In each of said three places, namely Valdez, Alaska, Anchorage, Alaska, and Seward, Alaska, is a United States Post Office, and between said places there is a regular weekly service of United States mails.

On the 8th day of July, 1931, I served the hereto annexed separate answer of defendant H. P. Sullivan, by depositing in the United States Post Office at Valdez, Alaska, a full, true, and correct copy of said answer, certified to be such copy by me as one of the attorneys for said defendant, duly enclosed in an envelope with the postage prepaid thereon, and addressed to said L. D. Roach at Anchorage, Alaska, and at the same time I did

in like manner, mail a full, true and correct copy of said answer, certified by me in like manner, to said L. V. Ray, addressed to him at Seward, Alaska.

W. N. CUDDY

Subscribed and sworn to before me on this 8th day of July, 1931, in the town of Valdez, Third Division, Territory of Alaska.

[Notarial Seal] ANTHONY J. DIMOND
Notary Public for Alaska. My Commission expires
February 13, 1933.

[Endorsed]: Filed Jul. 8, 1931. [25]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANTS
E. H. BOYER AND A. F. STOWE.

Come now the above named defendants, E. H. Boyer and A. F. Stowe and appearing for themselves only and not for their co-defendants, in answer to the plaintiff's amended complaint herein, admit, deny, and allege as follows, to-wit:

I.

Referring to Paragraph I of said amended complaint, defendants admit the same.

II.

Referring to Paragraph II of said amended complaint, defendants admit the same.

III.

Referring to Paragraphs III and IV of said amended complaint, defendants admit that the plain-

tiff has for many years resided at Kodiak, Alaska, where he is now and for a long time past has been engaged in the general mercantile business, including the buying and selling of furs; and defendants admit that true copies of the complaint and warrant in the criminal action therein described are annexed to said amended complaint and marked respectively Exhibit "A" and [26] Exhibit "B"; defendants deny the remainder of Paragraphs III and IV of said amended complaint, and allege the facts with reference to the subject matter of said Paragraphs to be as follows:

On and immediately prior to the 15th day of March, 1928, defendant E. H. Boyer was reliably informed that a certain person, an alien and not a citizen of the United States of America, then residing at Kodiak, had bought and sold, and was then engaged in the buying and selling of the skins of fur bearing animals at Kodiak, Alaska, without first having obtained a license so to do as required by the provisions of the Alaska Game Law, and that said person had sold at least one of said skins of fur bearing animals to the plaintiff in this action with the full knowledge on the part of the plaintiff that said person had bought and sold and was then engaged in the buying and selling of the skins of fur bearing animals in violation of the Alaska Game Law, and that the skin so purchased by plaintiff had been purchased and was being sold to plaintiff in violation of said Alaska Game Law; that defendant E. H. Boyer honestly and in good

faith and upon proper and sufficient cause believing that the Alaska Game Law was being violated by said person, requested the defendant A. F. Stowe to ask the plaintiff for an inspection of his records of the plaintiff's purchase of furs; that the defendant A. F. Stowe thereupon and on the 15th day of March, 1928, went to the plaintiff's place of business and requested plaintiff's clerk to permit him, the defendant A. F. Stowe, to see and inspect the plaintiff's records of the furs purchased by plaintiff shortly before said 15th day of March, 1928; that plaintiff's clerk refused to permit defendant A. F. Stowe to inspect said records, and thereupon defendant A. F. Stowe departed from plaintiff's place of business; that on the morning of the 16th day of March, 1928, defendant [27] A. F. Stowe reported to defendant E. H. Boyer that the plaintiff's clerk had refused to permit defendant A. F. Stowe to see the record of the furs purchased by plaintiff.

Thereafter and on the said 16th day of March, 1928, the defendant E. H. Boyer went to plaintiff's place of business in the town of Kodiak and requested that plaintiff allow him, the said defendant E. H. Boyer to inspect the records of the purchases of furs by plaintiff; that the plaintiff refused permission to said defendant E. H. Boyer to inspect the record of furs purchased by plaintiff and thereupon and at the request of the defendant E. H. Boyer, the plaintiff proceeded to the office of the defendant A. F. Stowe, who then was

and for some time theretofore had been the United States Commissioner and Justice of the Peace for the Kodiak precinct in the Third Judicial Division, Territory of Alaska. Upon arriving at said office the defendant E. H. Boyer, then and at all times theretofore fully and in good faith believing that he had a right under the law to inspect upon demand or request the plaintiff's said record of furs purchased by plaintiff, filed and made oath to a complaint in a criminal action, copy of which is attached to and made a part of the plaintiff's amended complaint herein; that thereupon the defendant A. F. Stowe, as such Commissioner and Justice of the Peace, having read said complaint, and fully and honestly and in good faith believing said complaint to state a crime against the defendant named therein, who is the plaintiff in this action, issued under his hand and seal of said Court, a warrant for the arrest of the plaintiff herein and directed the same to the defendant E. H. Boyer; that the defendant E. H. Boyer thereupon having received said warrant for the arrest of the plaintiff herein, and the same being fair on its face, the defendant E. H. Boyer fully and honestly and in good faith believed that said complaint and said warrant were both valid [28] and legal in all respects, and that it was his duty under said warrant to arrest the plaintiff herein; and that a short time after he had received said warrant and under and by virtue thereof, the defendant E. H. Boyer did arrest the plaintiff herein; that thereupon and within a very few minutes thereafter the plaintiff

posted cash bail for his appearance in said criminal action and was thereupon released from custody, and the trial of said action at the request of the plaintiff was set for the following day, namely, March 17th, 1928; that thereafter the trial of said cause was postponed from time to time, and was finally dismissed upon the motion of the plaintiff in said criminal action, namely, the United States of America.

In the bringing and filing of said criminal action, and in the making of said arrest, said defendants E. H. Boyer and A. F. Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law; and defendant A. F. Stowe, in receiving for file said complaint in said criminal action, and in issuing said warrant thereon, acted as a judicial officer and in the performance of judicial duties and within the judicial authority and discretion imposed and conferred upon him by law; that neither of said defendants at any time had or was actuated by any malice or ill-will against the plaintiff herein; and in truth and in fact on the said 16th day of March, 1928, and for a long time theretofore, said defendants E. H. Boyer and A. F. Stowe entertained very friendly feelings toward the plaintiff, and did not wish to cause him any harm or injury whatever.

IV.

Referring to Paragraphs 5, 6, and 7, of said amended complaint, defendants deny the same and

the whole thereof, except that a copy of the official bond of defendant H. P. Sullivan is attached to said amended complaint, and is marked [29] Exhibit "C".

WHEREFORE having fully answered herein, defendants pray that plaintiff's complaint be dismissed, and that defendants recover of plaintiff their costs and disbursement herein incurred.

W. N. CUDDY

Attorneys for Defendants

E. H. Boyer and A. F. Stowe. [30]

United States of America,
Territory of Alaska—ss.

W. N. Cuddy, being first duly sworn upon his oath says:

I am one of the attorneys for defendants E. H. Boyer and A. F. Stowe, named in the above entitled action, and I make this affidavit for and on behalf of said defendants for the reason that neither of said defendants is present at Valdez, Alaska, or within one hundred miles thereof. I have read the foregoing answer, and know the contents thereof, and believe the same to be true.

W. N. CUDDY.

Sworn to before me on this 8th day of July, 1931, in the town of Valdez, Third Division, Territory of Alaska.

[Seal]

ANTHONY J. DIMOND,

Notary Public for Alaska.

My Commission expires February 13, 1933. [31]

United States of America,
Territory of Alaska—ss.

W. N. Cuddy, being first duly sworn upon his oath, says:

I am one of the attorneys for the defendants E. H. Boyer and A. F. Stowe, named in the above entitled action. I reside at Valdez, Alaska. The attorneys for the plaintiff in said action are L. D. Roach, who resides at Anchorage, Alaska, and L. V. Ray, who resides at Seward, Alaska. In each of said three places, namely Valdez, Alaska, Anchorage, Alaska, and Seward, Alaska, is a United States Post Office, and between said places there is a regular weekly service of United States mails.

On the 8th day of July, 1931, I served the hereto annexed separate answers of defendants E. H. Boyer and A. F. Stowe, by depositing in the United States Post Office at Valdez, Alaska, a full, true, and correct copy of said answer, certified to be such copy by me as one of the attorneys for said defendants, duly enclosed in an envelope with the postage prepaid thereon, and addressed to said L. D. Roach at Anchorage, Alaska, and at the same time I did in like manner mail a full, true, and correct copy of said answer, certified by me in like manner, to said L. V. Ray, addressed to him at Seward, Alaska.

W. N. CUDDY.

[Title of Court and Cause.]

DEMURRER TO SEPARATE ANSWER OF
DEFENDANT H. P. SULLIVAN.

Plaintiff demurs to the separate answer of the defendant H. P. Sullivan, in that it appears upon the face of said answer that the same does not state facts sufficient to constitute a defense to the cause of action stated in the amended complaint of the plaintiff.

L. D. ROACH and L. V. RAY,
Attorneys for Plaintiff.

Receipt of copy and service admitted this day
of July, 1931.

.....,
of Attorneys for the Defendant H.
P. Sullivan.

[Endorsed]: Filed Aug 1, 1931. [34]

[Title of Court and Cause.]

DEMURRER TO SEPARATE ANSWER OF
THE DEFENDANTS E. H. BOYER AND
A. F. STOWE.

Plaintiff demurs to the separate answer of the defendants E. H. Boyer and A. F. Stowe, in that it appears upon the face of their said answer that the same does not state facts sufficient to constitute a

defense to the cause of action stated in the amended complaint of the plaintiff.

L. D. ROACH and L. V. RAY,
Attorneys for Plaintiff.

Receipt of copy and service admitted this
day of July, 1931.

.....,
of Attorneys for the Defendants E.
H. Boyer and A. F. Stowe.

[Endorsed]: Filed Aug 1, 1931. [35]

[Title of Court and Cause.]

M. O. OVERRULING DEMURRER.

The Court having heretofore heard argument of counsel on the Demurrers heretofore filed herein, and being fully advised in the premises,

DOES HEREBY ORDER that said Demurrers be, and the same hereby are, overruled.

[Endorsed]: Entered Court Journal No. A-6. Page No. 72. Sep. 23, 1931. [36]

[Title of Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANT NATIONAL SURETY COMPANY.

Comes now plaintiff above named and in reply to the answer of the Defendant National Surety Com-

pany and to the matters contained in paragraph three thereof:

Plaintiff denies that in the bringing and filing of said criminal action and in the making of the arrest of plaintiff the defendants Boyer and Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law.

Denies that on the 16th day of March, 1928, and for a long time prior thereto the said defendants or any of them had entertained very friendly feelings towards the plaintiff, but alleges that the arrest of said plaintiff on said day was the culmination of a series of persecutions by defendants towards said plaintiff.

Denies each and every other allegation, matter and thing in said paragraph 3 contained not otherwise admitted by the allegations of plaintiff's amended complaint.

Denies that the sum of \$500.00 or any other sum is a reasonable amount to allow defendant as an attorney's fee.

Wherefore, plaintiff prays for judgment as in his complaint and that defendants take nothing by their said defense.

L. D. ROACH,
ARTHUR FRAME,
L. V. RAY,
Attorneys for Plaintiff. [37]

United States of America,
Territory of Alaska, Third Division—ss.

L. D. Roach, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action, that he makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply; knows the contents thereof, and that he believes the same to be true; that he makes this affidavit of verification for and on behalf of said plaintiff for the reason that the plaintiff is not at Valdez, Alaska, the place where this affidavit is made, nor within the Territory of Alaska.

L. D. ROACH,

Subscribed and sworn to before me this 22nd day of November, 1933.

[Notarial Seal]

GEO. J. LOVE,

Notary Public in and for Alaska.

My Commission expires Nov. 25, 1934.

Service of the foregoing reply and receipt of a copy thereof is hereby admitted this 22nd day of November, 1933.

J. L. REED,

Attorney for Natl. Surety Co.

[Endorsed]: Filed Nov. 22, 1933. [38]

[Title of Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANT H. P. SULLIVAN.

Comes now the plaintiff above named and in reply to the answer of the Defendant H. P. Sullivan and to the matters contained in paragraph 2 thereof:

Plaintiff denies that in the bringing and filing of said criminal action and in the making of the arrest of plaintiff the defendants Boyer and Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law.

Denies that on the 16th day of March, 1928, and for a long time prior thereto the said defendants or any of them had entertained very friendly feelings towards the plaintiff, but alleges that the arrest of said plaintiff on said day was the culmination of a series of persecutions by defendants towards said plaintiff.

Denies each and every other allegation, matter and thing in said paragraph 2 contained not otherwise admitted by the allegations of plaintiff's amended complaint.

Wherefore, plaintiff prays for judgment as in his complaint and that defendants take nothing by their said defense.

L. D. ROACH.

ARTHUR FRAME.

L. V. RAY,

Attorneys for Plaintiff. [39]

United States of America,
Territory of Alaska,
Third Division.—ss.

L. D. Roach, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply; knows the contents thereof, and that he believes the same to be true; that he makes this affidavit of verification for and on behalf of said plaintiff for the reason that the plaintiff is not at Valdez, Alaska, the place where this affidavit is made, nor within the Territory of Alaska.

L. D. ROACH

Subscribed and sworn to before me this 22nd day of November, 1933.

[Seal]

GEO. J. LOVE

Notary Public in and for Alaska.

My commission expires Nov. 25, 1934.

Service of the foregoing reply and receipt of a copy thereof is hereby admitted this 22nd day of Nov. 1933.

J. W. KEHOE

Atty. for defts. Sullivan, Boyer & Stowe.

[Endorsed]: Filed Nov. 22, 1933. [40]

[Title of Court and Cause.]

REPLY TO SEPARATE ANSWER OF
DEFENDANTS E. H. BOYER and A. F. STOWE

Comes now the plaintiff above named and in reply to the answer of the Defendants E. H. Boyer and A. F. Stowe and to the matters contained in paragraph 3 thereof:

Plaintiff denies that in the bringing and filing of said criminal action and in the making of the arrest of plaintiff the defendants Boyer and Stowe acted honestly and in good faith and in the belief that it was their duty to so act for the enforcement of the provisions of the Alaska Game Law.

Denies that on the 16th day of March, 1928, and for a long time prior thereto the said defendants or any of them had entertained very friendly feelings towards the plaintiff, but alleges that the arrest of said plaintiff on said day was the culmination of a series of persecutions by defendants towards said plaintiff.

Denies each and every other allegation, matter and thing in said paragraph 3 contained not otherwise admitted by the allegations of plaintiff's amended complaint.

Wherefore, plaintiff prays for judgment as in his complaint and that defendants take nothing by their said defense.

L. D. ROACH
ARTHUR FRAME
L. V. RAY
Attorneys for plaintiff. [41]

United States of America,
Territory of Alaska,
Third Division.—ss.

L. D. Roach, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action, that he makes this affidavit of verification for and on behalf of said plaintiff; that he has read the foregoing reply; knows the contents thereof, and that he believes the same to be true; that he makes this affidavit of verification for and on behalf of said plaintiff for the reason that the plaintiff is not at Valdez, Alaska, the place where this affidavit is made, nor within the Territory of Alaska.

L. D. ROACH

Subscribed and sworn to before me this 22nd day of November, 1933.

[Notarial Seal]

GEO. J. LOVE

Notary Public in and for Alaska.

My commission expires Nov. 25, 1934.

Service of the foregoing reply and receipt of a copy thereof is hereby admitted this 22nd day of November, 1933.

J. W. KEHOE

of Attys. for Sullivan, Stowe & Boyer

[Endorsed]: Filed Nov. 22, 1933. [42]

[Title of Court and Cause.]

MOTION FOR JUDGMENT ON PLEADINGS.

Come now the defendants herein and respectfully move this Honorable Court for judgment upon the pleadings in the above-entitled cause upon the ground and for the reason that the plaintiff has failed to reply or otherwise answer or plead to the affirmative allegations set forth in each of the Separate Answers of said defendants on file herein or to any of them.

This motion is based upon the record and files herein.

J. W. KEHOE

United States Attorney and attorneys
for H. P. Sullivan, E. H. Boyer
and A. F. Stowe, defendants.

J. L. REED

Attorney for National Surety Company,
defendant.

Service of the foregoing Motion for Judgment on the Pleadings by receipt of a copy thereof is hereby acknowledged this 22nd day of November, 1933.

ARTHUR FRAME

One of the Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22, 1933. [43]

In the District Court for the Territory of Alaska,
Third Division.

No. 1387

O. KRAFT,

Plaintiff,

vs.

NATIONAL SURETY CO., a corporation, H. P.
SULLIVAN, E. H. BOYER, and A. F.
STOWE,

Defendants.

JUDGMENT.

This matter coming on regularly for hearing on the 23rd day of November 1933, on the motion of the defendants for judgment on the pleadings, the plaintiff being represented by his attorneys Arthur Frame, Esq., and L. D. Roach, Esq., and the defendant, National Surety Co., a corporation, being represented by its attorney, J. L. Reed, Esq., and the defendants H. P. Sullivan, E. H. Boyer and A. F. Stowe being represented by J. W. Kehoe, Esq., United States Attorney for the Third Division of the Territory of Alaska; and the Court having heard the arguments of counsel both for and against said motion it appearing to the court therefrom and from an inspection of the Amended Complaint and answers of the several defendants filed in said cause, that the plaintiff has failed to reply to the new matter and affirmative defense set forth in the answers of defendants, which new matter and affirmative allegations constitute a de-

fense to said action; and the matter of the granting of said motion having been submitted to the Court after argument, and testimony having been submitted by the Court as to what constitutes a reasonable attorney fee for the defendant National Surety Co., a corporation, the Court being fully advised in the premises,

IT IS HEREBY ORDERED, that the Motion of the defendants, National Surety Co., a corporation, H. P. Sullivan, E. H. Boyer [44] and A. F. Stowe, in favor of said defendants for judgment on the pleadings, be and the same is hereby granted, and it is therefore

ORDERED, ADJUDGED AND DECREED that the defendants do have of and recover from plaintiff judgment for their costs and disbursements of action, taxed by the Clerk in the sum of Three Hundred Sixty-seven and 10/100 (\$367.10) Dollars, and for the sum of Three Hundred (\$300.00) Dollars as Attorney's fee for the defendant, National Surety Co., a corporation.

Dated this 25th day of November, 1933.

CECIL H. CLEGG

District Judge.

[Endorsed]: Filed Nov. 25, 1933.

Entered Court Journal No. 17, Page No. 444,
Nov. 25, 1933. [45]

[Title of Court and Cause.]

PETITION OF O. KRAFT, PLAINTIFF, FOR
APPEAL TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

The above named plaintiff, O. Kraft, conceiving himself aggrieved by the judgment made and entered in this cause on the 23rd day of November, 1933, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and judgment made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated this 10th day of February, 1934.

(sgd) L. D. ROACH,
(sgd) ARTHUR FRAME,
(sgd) L. V. RAY,
Attorneys for Plaintiff Appellant.

Due service and receipt of copy acknowledged this 20th day of February, 1934.

J. L. REED,
Attorney for defendant appellee
National Surety Company, a cor-
poration.

J. W. KEHOE,
Attorney for defendants appellees
H. P. Sullivan, E. H. Boyer and
A. F. Stowe.

[Endorsed]: Filed Feb. 20, 1934. [46]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff above named, being the appellant herein, and assigns the following errors as having been committed by the Court in the proceedings of the above entitled action, which errors the said plaintiff intends to and does rely upon on his appeal to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit:

1.

The Court erred in overruling the demurrer of plaintiff to the separate answers of the defendants herein for the reason that the said answers do not state facts sufficient to constitute a defense to the cause of action and do not comply with the requirements of Section 895, Compiled Laws of Alaska.

2.

The court erred in granting defendants' motion for judgment on the pleadings.

3.

The court erred in entering judgment on the pleadings herein because the case was at issue and should have been submitted to a jury.

Wherefore the said appellant, O. Kraft, prays that the said order and judgment may be reversed and that this Court shall grant the relief prayed for in plaintiff's amended complaint in the District

Court for the Territory of Alaska, Third Division.

(sgd) L. D. ROACH,

(sgd) ARTHUR FRAME,

(sgd) L. V. RAY,

Attorneys for Appellant.

Due service and receipt of copy acknowledged this 17th day of February, 1934.

J. W. KEHOE,

Atty. for Sullivan, Boyer & Stowe.

J. L. REED,

Atty. for National Surety Co.

[Endorsed]: Filed Feb. 20, 1934. [47]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

This day came O. Kraft, the plaintiff in the above-entitled action, and presented his petition for an appeal and assignment of errors accompanying the same, which petition on consideration of the Court is hereby allowed and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit upon the filing of a bond in the sum of seven hundred and fifty dollars, with good and sufficient surety to be approved by the Court, which shall operate as a cost and supersedeas bond.

Done at Valdez, Alaska this 21st day of February, 1934.

CECIL H. CLEGG

Judge of the District Court.

[Endorsed]: Filed Feb. 21, 1934.

Entered Court Journal No. 17. Page No. 468.

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, O. Kraft, as principal, and Ben Kraft and Ed Bensen, as sureties, are held and firmly bound unto National Surety Co., H. P. Sullivan, E. H. Boyer and A. F. Stowe, defendants above named in the sum of \$750.00 to be paid to the said National Surety Co., H. P. Sullivan, E. H. Boyer and A. F. Stowe, their heirs, executors, administrators, successors and/or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this 12 day of February, 1934.

Whereas, the above-named plaintiff has taken an appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the judgment rendered against him in the above entitled action by the District Court for the Territory of Alaska, Third Division, which judgment was so rendered and entered by said court on the 25th day of November, 1933, for the sum of \$667.10, costs.

Now, therefore, the condition of the above obligation is such that if the above named O. Kraft shall prosecute his appeal to effect, and shall answer all costs and damages, if he shall fail to make good his plea, then this obligation to be void; other-

wise to remain in full force and effect.

OTTO KRAFT [Seal]

Principal

BEN KRAFT [Seal]

Surety

ED BENSEN [Seal]

Surety. [49]

United States of America

Territory of Alaska

Third Division—ss.

Ben Kraft and Ed Bensen, being first duly sworn, on oath depose and say each for himself: I am one of the sureties on the foregoing bond; I am a resident of the District or Territory of Alaska, but no counsellor or attorney at law, marshal, commissioner, clerk of any court, or other officer of any court; I am qualified to be bail, and I am worth the sum of \$750.00 specified in the foregoing undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities.

BEN KRAFT

ED BENSEN

Subscribed and sworn to before me this 12th day of February, 1934.

[Seal]

NORMAN NOBLE

Notary Public in and for Alaska. My commission expires July 14, 1935.

The foregoing bond is approved this 21st day of February, 1934.

CECIL H. CLEGG

District Judge.

O. K.

J. L. REED

Attorney for National Surety Co.

J. W. Kehoe by J. L. Reed [50]

[Endorsed]: Filed Feb. 20, 1934. [51]

[Title of Court and Cause.]

CITATION

To National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, Defendants and Appellees, and to their attorneys, J. W. Kehoe, J. L. Reed, and Donohoe & Diamond:

You, and each of you, are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof pursuant to an order allowing an appeal entered in the Clerk's office in the District Court for the Territory of Alaska, Third Division, at Valdez, in that certain action wherein O. Kraft was plaintiff and National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer, and A. F. Stowe were defendants, and

wherein O. Kraft is appellant, to show cause, if any there be, why the final judgment rendered therein against the plaintiff, O. Kraft, appellant, on the 23rd day of November, 1933, shall not be reversed and corrected, and why speedy justice should not be done to him, said O. Kraft, appellant, in that behalf.

Witness the Honorable Cecil H. Clegg, Judge of the District Court for the Territory of Alaska, Third Division, and the seal of said Court hereunto affixed this 21st day of February, 1934.

CECIL H. CLEGG

Judge of the District Court for the
Territory of Alaska, Third Division.

Attest:

[Seal] ROB'T. W. TAYLOR,
Clerk of said court,
By A. M. Dolan
Deputy.

Due service and a copy hereof acknowledged this 21st day of February, 1934.

J. L. REED

Attorney for National Surety
Company,

J. W. KEHOE by J. L. REED,

Attorney for Sullivan, Boyer &
Stowe, Appellees.

[Endorsed]: Filed Feb. 21, 1934. [52]

[Title of Court and Cause.]

NOTICE OF APPEAL

To National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer, and A. F. Stowe, appellees, and/or J. W. Kehoe, J. L. Reed, and Donohoe & Dimond, attorneys for said appellees.

You and each of you will please take notice that O. Kraft, plaintiff in above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment entered in the above-entitled action on the 23rd day of November, 1933, and that the certified transcript of record will be filed in the said Appellate Court within thirty days from the filing of this notice.

(sgd) L. D. ROACH,

(sgd) ARTHUR FRAME,

(sgd) L. V. RAY,

Attorneys for Appellant.

Due service and receipt of a copy hereof is admitted this 17th day of February, 1934.

J. W. KEHOE

Attorney for Sullivan, Boyer & Stowe

J. L. REED

Attorney for National Surety Co.

[Endorsed]: Filed Feb. 20, 1934. [53]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court for the Territory
of Alaska, Third Division.

You will please prepare and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, in connection with the appeal of O. Kraft, appellant, copies of the following pleadings, papers, and documents herein:

1. Plaintiff's amended complaint with exhibits.
2. Separate answer of defendant National Surety Company.
3. Separate answer of defendant H. P. Sullivan.
4. Separate answer of defendants E. H. Boyer and A. F. Stowe.
5. Plaintiff's demurrer to separate answer of National Surety Co.
6. Plaintiff's demurrer to separate answer of H. P. Sullivan.
7. Plaintiff's demurrer to separate answer of E. H. Boyer and A. F. Stowe.
8. Minute order overruling demurrers to above named answers and date.
9. Plaintiff's reply to separate answer of National Surety Co.
10. Plaintiff's reply to separate answer of H. P. Sullivan.
11. Plaintiff's reply to separate answer of E. H. Boyer and A. F. Stowe.

12. Defendant's motion for judgment on the pleadings.
13. Judgment.
14. Petition for appeal.
15. Assignment of errors.
16. Order allowing appeal.
17. Bond on appeal.
18. Citation on appeal.
19. Notice of appeal.
20. This praecipe.
21. Stipulation re printing transcript of record.
22. Minute order transferring cause to Valdez docket. [54]

Dated this 21st day of February, 1934.

(sgd) L. D. ROACH,

(sgd) ARTHUR FRAME,

(sgd) L. V. RAY,

Attorneys for Appellant.

Due service and receipt of a copy hereof is admitted this 17th day of February, 1934.

J. L. REED

Attorney for National Surety Company

J. W. KEHOE

Attorney for Sullivan, Boyer & Stowe

[Endorsed]: Filed Feb. 21, 1934. [55]

[Title of Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in the United States Circuit Court of Appeals, Ninth Circuit, all captions shall be omitted after the title of the cause has once been printed, and the words "Caption and title" and the name of the paper or document shall be substituted therefor. All other parts of the record shall be printed.

Dated this 10th day of February, 1934.

L. D. ROACH

ARTHUR FRAME (R)

L. V. RAY

Attorneys for Appellant.

J. L. REED

Attorney for Appellee National Surety Co.

J. W. KEHOE

Attorney for Appellees H. P. Sullivan,
E. H. Boyer and A. F. Stowe.

[Endorsed]: Filed Feb. 21, 1934. [56]

[Title of Court and Cause.]

HEARING ON MOTION TO TRANSFER
CAUSE TO VALDEZ DOCKET.

Now on this day came A. J. Dimond, Esq., one of the attorneys for the above-named defendants, H. P. Sullivan, E. H. Boyer and A. F. Stowe; comes

also L. V. Ray, Esq., one of the attorneys for the above-named plaintiff, O. Kraft;

WHEREUPON argument was had by respective counsel on defendants' motion for an order transferring the above-entitled cause to the Valdez Docket for trial at Valdez, Alaska;

WHEREUPON, after argument, the Court ordered that this cause be put on the Valdez Docket for trial at Valdez, Alaska reserving the right to the plaintiff to further move for a transfer to some other place for trial.

Entered Court Journal No. A-6, Page No. 174,
May 20, 1932. [57]

CERTIFICATE OF CLERK OF DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Third Division.—ss.

I, ROB'T. W. TAYLOR, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing, consisting of 57 pages, constitutes a full, true and correct transcript of the record on appeal in cause No. 1387, entitled O. Kraft, Plaintiff, vs. National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, Defendants, and was made pursuant to and in accordance with the praecipe of the Plaintiff, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and I certify that the Citation on Appeal is the original thereof

And I do further certify that the Index thereof, consisting of page number i, is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page ii, is a correct list of the attorneys of record.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$14.55, was paid to me by L. D. Roach, one of the attorneys for the plaintiff and appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 28th day of February, 1934.

ROBT. W. TAYLOR

Clerk of the District Court,
Territory of Alaska,
Third Division. [58]

[Title of Court and Cause.]

DEMURRER TO AMENDED COMPLAINT.

Comes now the defendant National Surety Company, a corporation, in the above-entitled action and demurs to the Amended Complaint of the plaintiff on file herein upon the ground that it appears upon the face thereof that said amended complaint does not state facts sufficient to constitute *and* cause of action.

J. L. REED

Attorney for defendant National Surety
Company, a corporation.

[Endorsed]: Filed Jan. 15, 1931. [62]

[Title of Court and Cause.]

MOTION FOR BILL OF PARTICULARS
DEMURRER TO AMENDED COMPLAINT.

Now at this time this matter came on regularly for hearing upon the Motion of defendants for a Bill of Particulars, defendants H. P. Sullivan, E. F. Boyer and A. F. Stowe being represented by A. J. Dimond, Esq., and upon the Demurrer of the National Surety Company to the Amended Complaint, said corporation being represented by J. L. Reed, Esq.,

WHEREUPON argument was had and the Court being fully advised in the premises, defendants' Motion for Bill of Particulars and Demurrer were overruled, to which rulings of the Court exceptions were allowed and taken. Defendants were granted twenty days in which to answer.

Entered Court Journal A-6, Page 29.

June 22, 1931. [63]

[Title of Court and Cause.]

COUNTER-PRAECIPE FOR TRANSCRIPT
OF RECORD.

To the Clerk of the District Court for the Territory of Alaska, Third Division:

You will please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, in connection with the appeal of O. Kraft, appellant, vs.

National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, appellees, copies of the following pleadings, papers and documents herein:

- (a) Defendant National Surety Company's demurrer to plaintiff's amended complaint.
- (b) Minute order overruling demurrer of the defendant National Surety Company to plaintiff's amended complaint.

Dated at Valdez, Alaska, this 21st day of February, 1934.

J. L. REED

Attorney for defendant National Surety Company, a corporation, Appellee.

Service of the foregoing Counter-Praecipe for Transcript of Record is hereby accepted by receipt of a copy thereof this 21st day of February, 1934.

L. D. ROACH

One of the Attorneys for Appellant.

ROB'T. W. TAYLOR,

Clerk for

J. W. KEHOE,

Attorney for Sullivan, Boyer and Stowe, Appellees.

[Endorsed]: Filed Feb. 21, 1934. [64]

CERTIFICATE OF CLERK OF DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Third Division.—ss.

I, ROB'T. W. TAYLOR, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing, consisting of 3 pages, constitutes a full, true and correct transcript of the record on appeal in cause No. 1387, entitled O. Kraft, Plaintiff, vs. National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, Defendants, and was made pursuant to and in accordance with the counter-praecipe of the Defendant National Surety Company, a corporation, filed in this action.

And I do further certify that the Index thereof, consisting of page number i, is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page ii, is a correct list of the attorneys of record.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$1.70, was paid to me by J. L. Reed, attorney for the defendant National Surety Company, a corporation, and one of the appellees herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court this 28th day of February, 1934.

ROBT. W. TAYLOR

Clerk of the District Court,
Territory of Alaska,
Third Division. [65]

[Endorsed]: No. 7426. United States Circuit Court of Appeals for the Ninth Circuit. O. Kraft, Appellant, vs. National Surety Company, a corporation, H. P. Sullivan, E. H. Boyer and A. F. Stowe, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

Filed March 13, 1934.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7426

In The
United States Circuit Court of Appeals
For the Ninth Circuit. 4

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a
corporation, H. P. SULLIVAN, E.
H. BOYER and A. F. STOWE,

Appelles.

No. 7426

BRIEF FOR APPELLANT

L. D. ROACH,

ARTHUR FRAME,

Anchorage, Alaska,

L. V. RAY,

Seward, Alaska,

Attorneys for Appellant.

FILED
SEP 24 1934



No. 7426

In The
United States Circuit Court of Appeals
For the Ninth Circuit.

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a

corporation, H. P. SULLIVAN, E.

H. BOYER and A. F. STOWE,

Appelles.

No. 7426

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE TER-
RITORY OF ALASKA, THIRD
DIVISION

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

For convenience we shall refer to the parties as designated in the trial court.

Plaintiff brought an action for malicious prosecution against a U. S. Commissioner and ex-officio Justice of the Peace, a deputy U. S. Marshal, the

U. S. Marshal of the Division and his bondsmen (Tr. p. 1), charging also a breach of the official bond of the U. S. Marshal. (Tr. p. 5). After various motions and demurrers were disposed of Defendants answered separately (Tr. pp. 13-21-29). The marshal disclaimed knowledge of the prosecution at its inception, all defendants alleging the prosecution was brought because an inspection of plaintiff's records were desired to secure evidence of a violation of the game law by an alien whose name is not disclosed. Dismissal of the suit was admitted and all material allegations of the amended complaint denied. Plaintiff demurred (Tr. pp. 36-37) as answers did not constitute a defense. Demurrers were overruled (Tr. p. 38) and the case, having been transferred to the Valdez docket upon motion of defendants (Tr. p. 58), was called for trial at Valdez. Defendants moved for judgment on the pleadings on that day (Tr. p. 45) and on the same day and before the hearing on the said motion plaintiff filed replies to the answers (Tr. pp. 38-41-43). The Court granted the defendants' motion and gave judgment for costs and attorney's fee (Tr. p. 46). From which order and judgment and the overruling of his demurrers the plaintiff appeals.

SPECIFICATIONS OF ERROR.

On this appeal the appellant relies upon and intends to urge errors which he asserts were made by the District Court.

1. The court erred in overruling the demurrer of plaintiff to the separate answers of the defendants for the reason that the said answers do not state facts sufficient to constitute a defense to the cause of action and do not comply with the requirements of Section 895, Compiled Laws of Alaska.

2. The court erred in granting defendants' motion for judgment on the pleadings.

3. The court erred in entering judgment on the pleadings because the case was at issue and should have been submitted to a jury. (Tr. p. 49.)

ARGUMENT.

The court erred in overruling the demurrer of plaintiff to the answers of defendants.

Sec. 895, Compiled Laws of Alaska, reads in part:

“The answer of the defendant shall contain—First. A general or specific denial . . . Second. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition.”

Defendant H. P. Sullivan, U. S. Marshal (Tr. p.

26), sought to avoid liability by disclaiming knowledge of the justice court case at its inception. It is submitted that this does not constitute new matter within the purview of the section above quoted and is wholly immaterial as a defense, in this:

“The averment of a conspiracy does not in any way change the nature of the action,” 38 C.J. 463, Sec. 125.

The gist of the action is not the conspiracy. See Note 29 of above citation.

The U. S. Marshal was responsible under his bond whether he conspired or not. Whether or not he was a joint tortfeasor he was responsible for the acts of his deputy, acting under color and by virtue of his office. (*Fidelity & Deposit Co. of Maryland vs. Bordsley*, 22 Fed. 603). Would plaintiff have submitted to arrest otherwise? Plaintiff alleges he was a conspirator, he denies the charge, but whether it was alleged or capable of proof is immaterial. It does not go to the merits of the action, but is merely an aggravation of the offense if proved. He was sued for a breach of his bond as under the Laws of Alaska he is held responsible on his official bond for the acts of his deputy.

Sec. 369, Compiled Laws of Alaska, says, inter alia, “Each marshal . . . shall be responsible on his

official bond for the acts of all deputy marshals appointed by him.”

“The rule that the superior officer is liable for acts of his deputy done under color of his office is too well settled to need discussion.” Holden vs. Williams (U. S. Marshal), Alaska, April 29, 1896, 75 Fed. 798.

Murfee on Official Bonds, Sec. 211.

Lee vs. Charmley, 129 N.W. 448, 33 LRA NS 275.

Regulation 21 of The Alaska Game Law, reads:

“Each licensed fur farmer or fur dealer shall comply with the provisions of all Territorial laws relating to fur farmers and fur dealers, and, at all reasonable hours, shall allow any member of the commission, any game warden, or any authorized employee of the United States Department of Agriculture to enter and inspect the premises where operations are being carried on under these regulations, and to inspect the books and records relating thereto.”

What is the defense defendants Boyer and Stowe offered? Two petty officials, who had the freedom of the mails and the Naval Radio and could have had advice from the District Attorney within a few hours (they admit they postponed the case time after time until finally the District Attorney was advised of it and ordered it dismissed), claiming they were acting in the belief it was their duty to

enforce the game laws by arresting a gentleman of forty years residence in the community, one of the biggest merchants and property owners, a shareholder in canneries in the vicinity, a man with children and grandchildren. He would not run away. There was no need for precipitous action. Boyer alleges (Tr. p. 30) he heard he was trafficking in illegal furs with an unnamed alien and apparently to coerce, intimidate and force him to furnish evidence against himself and the unknown they bring this charge against him. This is not a defense in reason and we submit not in law.

“A void process procured through malice, and without probable cause, is even more reprehensible, if possible, than if it charged a criminal offense. The wrong is not in the charge alone but more in the object and purposes to be gained and the intention and motive in procuring the complaint and arrest.” *McIntosh vs. Wales* (Wyo.) 134 Pac. 276, cited with approval in *Peterson vs. Hoyt*, 4 Alaska 715.

“Ignorance of the law excuses no man, least of all an officer, for, having undertaken to perform the duties of his office, he must know and perform them at his peril.” *York vs. Clifton, et al*, 32 Ga. 364.

Cited by the court in *Jackson vs. Siglin*, 10 Oregon 96.

The court erred in granting defendants' motion for judgment on the pleadings.

Malice and lack of probable cause were alleged in the amended complaint (Tr. p. 6), and controverted by the answers (Tr. pp. 19-27-33), and no new matter or counterclaim being averred in the answer it is submitted that the case was at issue without further pleading on the part of the plaintiff.

"Defendant is not entitled to a judgment because of the failure to reply, where the case is sufficiently at issue without it, or the matter set up by the defendant is insufficient to require a reply, or where the admissions resulting from the failure to reply do not defeat plaintiff's cause of action." 49 C.J. 673, *Watkins vs. S. P. R. Co.* 38 Fed. 711, 4 LRA 239.

"Matters to which, if plaintiff should reply, he could do so only by reiterating the allegations of his complaint, is not new matter." 49 C.J. 326, Sec. 396, Note 30; *Muskoge Vitrified Brick Co. vs. Napier*, 126 Pac. 792; *Pott vs. Hanson*, 109 Minn. 416, 124 N.W. 17.

"A reply cannot be required, and is never necessary, to allegations which are in form new matter but in substance amount merely to denials" 49 C.J. 327, Sec. 397, Note 35. *Watkins* case cited above.

The court erred in entering judgment on the pleadings.

“The granting of a judgment upon the pleadings on motion is not regarded with favor by the courts.” *Betsch et al vs. Umphrey et all*, 252 Fed. 573.

“A motion for judgment on the pleadings is not in harmony with the spirit of code procedure and is not favored.” *Currie vs. S. P. Co.*, 23 Oregon 400, 31 Pac. 963.

“It is well settled that, where a material issue is tendered by the pleadings, judgment on the pleadings is improper.” *Lovelock Land vs. Lovelock Land & Development Co.*, 7 Pac. (2nd) 593-595.

Childers vs. N. Y. L. Ins. Co., 117 Okla. 7, 245 Pac. 59, cited in *Smith vs. Hughes*, 135 Okla. 296, 275 Pac. 628, 65 ALR 573-581.

Respectfully submitted,

L. D. ROACH,

ARTHUR FRAME,

L. V. RAY,

Attorneys for Appellant.

No. 7426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 5

OCTOBER TERM, 1934

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a corporation,
H. P. SULLIVAN, E. H. BOYER and A. F. STOWE,

Appellees.

BRIEF FOR THE APPELLEES H. P. SULLIVAN,
E. H. BOYER AND A. F. STOWE.

GEORGE C. SWEENEY,
Assistant Attorney General.

J. W. KEHOE,
United States Attorney.

HENRY H. MCPIKE,
United States Attorney.

C. KEEFE HURLEY,
Attorney.

Attorneys for Appellees H. P. Sullivan, E. H. Boyer and A. F. Stowe.

FILED

OCT 26 1934

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No. 7426

IN THE

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Appellant,

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NATIONAL SURETY COMPANY, a corporation,
H. P. SULLIVAN, E. H. BOYER and A. F. STOWE,

Appellees.

BRIEF FOR THE APPELLEES H. P. SULLIVAN, E. H. BOYER AND A. F. STOWE.

QUESTION.

The question presented for consideration by this appeal is whether or not the District Court erred in granting judgment on the pleadings, on motion of the defendants where the plaintiff had failed for twenty-six months to reply to an answer or deny new matter set up by way of an affirmative defense to an action for malicious prosecution. A rule of Court required such pleading to be filed in five days. No Court order was ever made extending the time and no leave was granted by the Court to file replies.

The plaintiff set up a state of facts which if undisputed would entitle it to a recovery. The defendants denied these allegations and set up facts by way of special defense which if proven would overcome the facts set out in the petition. In other words, if the plaintiff proved all he alleged and the defendant proved all it alleged, the Court at the conclusion of the testimony would be compelled to direct a verdict in favor of the defendants or enter a judgment in favor of the defendant.

In order that the pleadings might be properly tested it is necessary to set out the gist of the complaint and the gist of the answer including the special defenses.

In order to see the situation at a glance the following statement is necessary:

On March 16, E. H. Boyer, a United States Marshal and one of the appellees, swore to a violation of the Alaskan Game Law by the appellant (R. 8) and on the same date a warrant of arrest (R. 9-10) issued by the United States Commissioner, A. F. Stowe, an ex officio justice of the peace, another appellee, and plaintiff was arrested and furnished bond (R. 4). Trial was set for March 17, 1928 and continued until March 19 and until March 30, 1928, when the prosecution was abandoned (R. 3). Plaintiff alleges arrest was result of malice and conspiracy to injure plaintiff and asks \$16,000 damages (R. 2-3). The complaint alleges foregoing suit filed on December 26, 1930.

National Surety Company (R. 13-19) on July 11, 1931, H. P. Sullivan (R. 21-27) on July 8, 1931, E. H. Boyer, and A. F. Stowe (R. 29-35) on July 8, 1931, filed separate answers and denied any conspiracy or malice or that the defendant had been damaged, and by way of affirmative defense set up that E. H. Boyer, Deputy United States Marshal, for that jurisdiction, was reliably informed that a certain alien non-resident of the United States of America had bought and sold and was illegally engaged in the buying and selling of skins of fur bearing animals at Kodiak, Alaska, without having first obtained a license as required by the provisions of the Alaskan Game Law, and that said alien person had sold at least one of said skins of fur bearing animals to plaintiff with the full knowledge on the part of the plaintiff that said person had bought and sold and was engaged in the buying and selling of the skins of fur bearing animals, illegally, and purchased by the plaintiff knowingly and unlawfully, and defendant Boyer honestly and in good faith and upon proper and sufficient cause believing that the Alaskan Game Law was being violated by said plaintiff, requested A. F. Stowe, United States Commissioner, to make an inspection of plaintiff's records of purchases of furs; that the defendant Stowe's request was refused by plaintiff and by plaintiff's clerk; that on the following day, March 16, 1928, E. H. Boyer, Deputy United States Marshal, being informed by Stowe of plaintiff's refusal, himself requested permission of plaintiff to inspect his record of fur purchases, which plaintiff again declined and thereupon said plaintiff proceeded with defendant Boyer to the

office of the United States Commissioner where Boyer in good faith, believing that he had a right under the law to inspect upon demand or request, the plaintiff's said record of furs purchased by plaintiff, filed and made an oath to a complaint in a criminal action against plaintiff and thereupon A. F. Stowe as Commissioner and Justice of the Peace, having read said complaint and acting honestly and in good faith as a judicial officer and in the performance of judicial duties and within the judicial authority and discretion imposed and conferred upon him, issued said warrant; that all of said defendants entertained very friendly feeling toward plaintiff and did not wish to cause him any harm or injury whatever and were not actuated by malice, ill will or enmity.

On *August 1st, 1931*, plaintiff filed separate demurrers to answers of National Surety, H. P. Sullivan and Boyer and Stowe (R. 36, 37, 38). On *September 23, 1931*, demurrers overruled (R. 38). On *May 20, 1932*, this suit on defendant's motion was transferred to the Valdez Alaska Docket for trial (R. 58). On *November 22, 1933*, twenty-six months after the overruling of plaintiff's demurrer to the answers of the several defendants, the defendants moved for judgment upon the ground that no answer or denial of any kind had been filed to the affirmative allegations set forth in each of the answers filed by the defendants (R. 45) and on the same date (November 22, 1933), the plaintiff filed replies to the separate answers of the National Surety Company (R. 38, 39, 40) of E. H. Boyer and A. F. Stowe (R. 43, 44), and Sullivan.

On November 23, 1933, the Court granted the motion of the defendants for judgment upon the pleadings and found "from an inspection of the Amended Complaint and answers of the several defendants filed in said cause, that the plaintiff has failed to reply to the new matter and affirmative defense set forth in the answer of defendants, which new matter and affirmative allegations constitute a defense to said action" (R. 46, 47).

STATUTES INVOLVED.

Section 336, Compiled Laws of Alaska, entitled "Game Laws", is as follows, so far as here pertinent:

"Enforcement. * * * Any marshal, deputy marshal, or warden in or out of Alaska may arrest without warrant any person found violating any of the provisions of this act or any of the regulations herein provided, * * *".

Regulation No. 21 under the above-entitled Law is as follows:

"Each licensed fur farmer or fur dealer, including stores operated by Missions or otherwise for native Indians, Eskimos, or half-breeds, shall comply with the provisions of all territorial laws relating to fur farmers and fur dealers, and, at all reasonable hours, shall allow any member of the Commission, any game warden, or any authorized employee of the United States Department of Agriculture to enter and inspect the premises where operations are being carried on under these regulations, and to inspect the books and records relating thereto."

Section 895, Compiled Laws of Alaska, is as follows:

“The answer of the defendant shall contain

“First. A general or specific denial of each material allegation of the complaint controverted by the defendant or any knowledge or information thereof sufficient to form a belief.

“Second. A statement of any new matter constituting a defense or counterclaim is ordinary and concise language without repetition.”

Section 901, Compiled Laws of Alaska, is as follows:

“If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff failed to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages.”

Rules of the District Court for the Territory of Alaska,
Third Division, Involved Herein.

Rule No. 27:

“Unless some definite time is fixed by statute or special order or rule of court, a party against whom a pleading is filed must respond thereto by reply or other pleading within five days from the time the same is served on him or service waived by him.”

Rule No. 12:

“Cases which have been pending in this court for more than one year without any proceeding having been taken therein may be dismissed as of course, for want of prosecution, by the court on

its own motion at a call of the Calendar. Such cases may also be dismissed for want of prosecution at any time by motion of any party upon notice to the other parties.”

BRIEF AND ARGUMENT.

Rule No. 27, *supra*, of the District Court grants five days within which to plead, unless some definite time is fixed by statute, or special rule; and Rule No. 12, makes any case pending for more than one year without any proceedings eligible to be dismissed for want of prosecution upon motion and notice to the opposite party. In this case the record fails to show any order extending the time beyond five days from September 23, 1931 (R. 38), the date on which the demurrer was overruled, and as opposed to any such presumption that the time for filing a reply to the various answers had been extended, the Court found in the judgment on *November 23*—twenty-four hours after the transcript shows the various replies to have been filed in Court—that *there had been no filing*. It is therefore not a violent presumption to assume that the Court declined to permit the filing of said replies and rendered judgment.

Every presumption is indulged in favor of the validity of any judgment, regular on its face, unless it is overcome by matters apparent in the record. With Rules 12 and 27 it is apparent that the Lower Court enforced these rules.

It is submitted that the record in this case fails to show an extension of time beyond five days from the

date the demurrers were overruled. For the appellant to prevail in this action there should be an affirmative showing that an extension *was* granted or that the Court permitted the filing out of time—an abuse of discretion on the part of the Court—in refusing to permit it to file answers two years and twenty-five days out of time.

In the face of all this the appellant insists the replies *were* filed. Appellant also contends that the matter set out in the complaint was a sufficient denial of the special defense. We submit this is not the case, and that the finding in the judgment is conclusive that no replies were allowed to be filed out of time and that with the special defense uncontroverted, it would have been a farce to have permitted a trial which demanded a finding for the defendant. It is respectfully submitted no error is shown in granting judgment on the pleadings and that the judgment of the lower Court should be affirmed.

GEORGE C. SWEENEY,
Assistant Attorney General.

J. W. KEHOE,
United States Attorney.

HENRY H. MCPIKE,
United States Attorney.

C. KEEFE HURLEY,
Attorney.

*Attorneys for Appellees H. P.
Sullivan, E. H. Boyer and
A. F. Stowe.*

United States
Circuit Court of Appeals
For the Ninth Circuit. 6

UNITED STATES OF AMERICA,
Appellant,
vs.
THOMAS BEE WILLIAMS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Southern Division.

FILED

APR 17 1934

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THOMAS BEE WILLIAMS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Southern Division.

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

ROY C. FOX,

U. S. District Attorney,
Federal Bldg.,
Spokane, Wash.

C. L. DAWSON,

Dept. of Justice,
Washington, D. C.,
Attorneys for Appellant.

WM. G. BOLAND,

Larsen Bldg.,
Yakima, Wash.

RUSSELL FLUENT,

Penbrook Hotel,
317 Marion St.,
Seattle, Wash.

Attorneys for Appellee.

United States District Court
Eastern District of Washington
Southern Division.

L-1709.

THOMAS BEE WILLIAMS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That plaintiff enlisted in the military forces of the United States on or about the 19th day of June, 1916; that he served in Company F, 116th Engineers of the American Expeditionary Forces until December, 1917, and with Company E, 2nd Engineers, until April 1st, 1918; that he was a casualty in hospitals and convalescent centers from April 1st, 1918, to the date of his discharge; that he was honorably discharged from said military service of the United States on the 28th day of May, 1919 and is now a resident of Yakima, Washington.

II.

That during the month of November, 1917, desiring against the risks of war, plaintiff, Thomas

Bee Williams, applied for and was granted a policy of war risk insurance in the sum of \$10,000 and thereafter there was deducted from his monthly pay the premiums for said insurance and a policy of war risk insurance was duly issued to him, by the terms whereof the defendant agreed to pay the plaintiff the sum of \$57.50 per month in the event he suffered total permanent disability to such an extent that he would be unable to follow continuously and substantially gainful occupation. [1*]

III.

That in the course of and while on active service with the Engineers of the American Expeditionary Forces, on the Verdun front, at Chateau Thierry and in Alsace Lorraine, in the rain and cold and under the adverse conditions of war, plaintiff contracted a severe cough and cold which remained with him and became aggravated from exposure and hardships and developed into active, chronic, pulmonary tuberculosis and chronic bronchitis, and and as a further result of all the foregoing he contracted chronic myocarditis and became extremely nervous and neuresthenic, all rendering him incapable of performing any work requiring physical exertion.

IV.

That by reason of the foregoing the plaintiff was discharged from the United States Army totally

*Page numbering appearing at the foot of page of original certified Transcript of Record.

and permanently disabled from following continuously any substantially gainful occupation and will never again be able to follow any substantially gainful occupation; that he became entitled to receive from the defendant under the terms of said war risk insurance policy, the sum of \$57.50 per month commencing on the 28th day of May, 1919, the date of his discharge.

V.

That plaintiff duly made proof of said total and permanent disability to the defendant and demanded payment of the aforesaid amounts; that an appeal was taken to the Administrator of Veterans Affairs on the 25th day of May, 1931, but the defendant has disagreed with the plaintiff as to his claim and the extent of his disability and so notified the plaintiff by a letter of disagreement dated the 28th [2] day of June, 1932, and has refused and still refuses to pay the same.

WHEREFORE plaintiff demands judgment against the defendant in the sum of fifty seven dollars and fifty cents (\$57.50) per month from the date of said total and permanent disability.

RUSSELL H. FLUENT,

Address #56 Penbrook Apts.,
4th & Marion,
Seattle, Washington.

W. G. BOLAND,

Address A. E. Larson Bldg.,
Yakima, Washington.

Attorneys for Plaintiff.

United States of America,
State of Washington,
County of Yakima—ss.

THOMAS BEE WILLIAMS being first duly sworn, on oath deposes and says; that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

THOMAS BEE WILLIAMS.

Subscribed and sworn to before me this 20th day of July, 1932.

[Seal]

W. G. BOLAND,

Notary Public in and for the State of Washington, residing at Yakima.

[Endorsed]: Filed July 22, 1932 [3]

[Title of Court and Cause.]

ANSWER.

Comes now defendant, United States of America, and answering the complaint of plaintiff herein admits, denies and alleges as follows:

I.

Answering paragraph one of said complaint, defendant admits that plaintiff enlisted in the military service of the United States on the 19th day of June, 1916, and was honorably discharged therefrom on the 28th day of May, 1919, and denies each and every other allegation, matter and thing set forth and contained in said paragraph one.

II.

Answering paragraph two of said complaint, defendant admits that during the month of November, 1917, the insured applied for and was granted war risk term insurance in the sum of \$10,000, and that said insurance by its terms was payable at the rate of \$57.50 per month in the event of insured's total and permanent disability or death during the time when said insurance was in full force and effect, and further admits that premiums on said insurance were paid to include the month of May, 1919, and denies each and every other allegation, matter and thing set forth and contained in said paragraph two. [4]

III.

Answering paragraph three of said complaint, denies each and every allegation, matter and thing set forth and contained in said paragraph three.

IV.

Answering paragraph four of said complaint, denies each and every allegation, matter and thing set forth and contained in said paragraph four.

V.

Answering paragraph five of said complaint, admits that a disagreement exists between plaintiff and the United States Veterans Bureau as to the payment of said insurance, and denies each and every other allegation, matter and thing set forth and contained in said paragraph five.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his complaint herein and that defendant have and recover its costs and disbursements herein.

ROY C. FOX,
United States Attorney,
E. J. FARLEY,
Assistant United States Attorney,
LESER E. POPE,
Chief Attorney, United States
Veterans Bureau,
Attorneys for Defendant. [5]

United States of America,
Eastern District of Washington—ss.

ROY C. FOX, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting United States Attorney for the Eastern District of Washington and that he makes this verification as such; that he has read the above and foregoing answer, knows the contents thereof and that the same is true, as he verily believes.

ROY C. FOX.

Subscribed and sworn to before me, this 20th day of July, 1933,

A. A. LaFRAMBOISE,
Clerk, United States District Court, Eastern District of Washington.

[Seal] By EVA M. HARDIN,
Deputy.

[Endorsed]: Filed July 20, 1933. [6]

October, 1933 Term October 14, 1933 11th day

Court convened pursuant to adjournment at 10 a. m.

PRESENT: Honorable J. Stanley Webster,
Judge, A. A. La Framboise, Clerk, Roy C. Fox,
U. S. Attorney, D. L. Hyatt, Deputy U. S. Marshal.

PROCEEDINGS.

[Title of Cause.]

Trial of case resumed, with the following witnesses, testifying on behalf of the defendant:

- 1 Dr. Albert C. Feeman
- 2 Dr. A. D. Tollefson
- 3 R. D. Lang
- 4 Harry Telfer)
- 5 Richard Snyder) By affidavit
- 6 Nick Visser)

Deposition of H. W. Hansen read.

Deposition of Dr. C. O. Decker, offered and refused.

 " of Dr. Paul J. Dailey " " "

Plaintiff rested.

Defendant moved for non-suit, which motion was denied.

Defendant moved for a directed verdict, in which motion the plaintiff then joined. The jury was then dismissed.

After argument of counsel, the Court rendered judgment in favor of the plaintiff and fixed the date of permanent and total disability as being February 2, 1919.

Extension of 90 days granted to file bill of exception.

J. STANLEY WEBSTER,

Judge. [7]

United States District Court
Eastern District of Washington
Southern Division.

No. L-1709.

THOMAS BEE WILLIAMS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED JUDGMENT.

This cause came regularly on for trial on the 12th day of October, 1933, before the Honorable J. Stanley Webster, Judge of the above entitled Court, the plaintiff, Thomas Bee Williams, appearing in person and with his witnesses and being represented by his attorney, Russell H. Fluent, and the defendant, United States of America, being represented by Roy C. Fox, United States Attorney and C. L. Dawson, Special Counsel for the Veterans Administration, and its witnesses, being present, a jury having been empaneled and sworn to try said cause, and the respective parties having submitted their evidence and rested, and the at-

torneys for defendant having made a motion for a directed verdict in favor of the defendant and the attorney for plaintiff having joined and having made a motion for a directed verdict for the plaintiff, whereupon the jury was dismissed, and the facts and the law having been fully argued and the trial having been concluded on the 14th day of October, 1933, and the Court on said 14th day of October, 1933, having rendered its oral opinion and decision in favor of the plaintiff to the effect that he became totally and permanently disabled on the 2nd day of Feb- [8] ruary, 1919, and in consequence thereof entitled to receive from the defendant the sum of fifty seven and 50/100 (\$57.50) dollars per month commencing on the said 2nd day of February, 1919, that being the amount due as monthly payments on a ten thousand dollar (\$10,000) policy of war risk insurance, requested in plaintiff's complaint, now, therefore,

It is ORDERED, ADJUDGED and DECREED that the plaintiff do have and recover from the defendant the sum of Ten thousand one hundred and twenty (\$10,120) dollars, that being the amount due under the \$10,000 policy of war risk insurance, at the rate of fifty seven and 50/100 (\$57.50) dollars per month commencing on the 2nd day of February, 1919, and continuing to the 2nd day of October, 1933, said payments to be made as by law in such cases provided.

It is FURTHER ORDERED, ADJUDGED and DECREED that Russell H. Fluent, attorney for

plaintiff, is entitled to receive and is hereby awarded from said judgment as a reasonable attorney's fee for his services in the above entitled cause, the sum of One thousand and twelve (\$1,012) dollars, that being ten per cent (10%) of said ten thousand one hundred and twenty (\$10,120) dollars, and that he is entitled to receive the further sum of ten per cent (10%) of each and every other payment hereinafter made by the defendant to the plaintiff, his heirs, executors, assigns and beneficiaries, in consequence of or as a result of the entrance of this judgment, said payments to be made as by law in such cases provided.

To all of which the defendant excepts and its exception is hereby allowed.

It further appearing to the Court that the above named plaintiff had heretofore on the 1st day of September, [9] 1919, reinstated Two thousand (\$2,000) dollars of his term insurance and converted the same to a 20-year endowment policy, which policy plaintiff now holds in conformity with the provisions of Section 307 of the World War Veterans Act, plaintiff is required to cancel and surrender up to defendant said converted policy before the judgment herein above entered becomes effective.

Dated this 15th day of December, 1933.

J. STANLEY WEBSTER,

United States District Judge.

O. K.

RUSSELL H. FLUENT,

Attorney for Plaintiff,

[Endorsed]: Filed Dec. 15, 1933. [10]

[Title of Court and Cause.]

PETITION ON APPEAL.

Comes now the United States of America, defendant herein, and says that on the 24th day of October, 1933, the Court entered a judgment against the said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of said defendant, all of which will appear more fully from the Assignment of Errors which is filed with this Petition.

WHEREFORE, the said defendant prays that an appeal may be allowed in its behalf to the United States Circuit Court of Appeals in and for the Ninth Circuit for the correction of the errors so complained of and that a citation my issue and a transcript of the record be sent to the said Circuit Court of Appeals.

ROY C. FOX,

United States Attorney.

E. J. FARLEY,

Assistant United States Attorney. [11]

It is ORDERED that the appeal prayed for in the above and foregoing petition be, and the same hereby is, allowed.

Dated this 10 day of January, 1934.

J. STANLEY WEBSTER,

United States District Judge.

[Endorsed]: Filed Jan. 10, 1934. [12]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above entitled action, by Roy C. Fox, United States Attorney for the Eastern District of Washington, and E. J. Farley, Assistant United States Attorney for the same district, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which defendant avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

The Court erred in denying defendant's motion at the close of plaintiff's case, for a verdict in defendant's favor, or, in the alternative, for a non-suit, on the ground and for the reason that the evidence adduced by and on behalf of plaintiff did not establish a *prima facie* case, and was insufficient to support a verdict, and on the further ground that there was no proof of any permanent and total disability occurring while the contract of insurance was kept in force and effect by the payment of the stipulated monthly premium [13] thereon, and on the further ground that the evidence affirmatively showed that plaintiff was not permanently or totally disabled, to which denial the defendant took exception at the time of the interposition of said motion herein.

II.

The Court erred in denying defendant's motion, at the close of all the evidence, for a directed verdict, upon the grounds and for the reason that the evidence adduced did not prove plaintiff to be permanently and totally disabled from following a gainful occupation during the time that his policy was in force and effect; and upon the further ground that the evidence affirmatively showed that the plaintiff was not permanently and totally disabled during the period that the policy sued upon was in force and effect, to which denial the defendant took exception.

III.

The Court erred in excluding from the evidence the depositions of Dr. C. O. Decker and Dr. Paul J. Dailey, which depositions were offered on behalf of defendant, to which ruling defendant excepted and exception was allowed.

IV.

The Court erred in denying the objection of defendant to the testimony of experts as to the ultimate facts, to which ruling defendant excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of the plaintiff herein, as the evidence was insufficient to sustain a judgment.

ROY C. FOX,

United States Attorney.

E. J. FARLEY,

Assistant United States Attorney.

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING
BILL OF EXCEPTIONS.

Upon application of the defendant made this date in open court, it is hereby

ORDERED that defendant's time for filing bill of exceptions in the above entitled cause be and is hereby extended to and until the 10th day of February, 1934.

Dated this 10th day of January, 1934.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Filed Jan. 10, 1934. [15]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled cause came on regularly for trial before the Honorable J. Stanley Webster, Judge of the District Court and a jury duly impaneled and sworn, plaintiff appearing in person and by his attorneys R. H. Fluent and W. G. Boland, defendant appearing by Roy C. Fox, United States Attorney, and C. W. Dawson, Special Attorney of the Department of Justice, and the following proceedings were had:

Plaintiff offered in evidence the testimony of the following witnesses:

TESTIMONY OF PLAINTIFF,
THOMAS BEE WILLIAMS.

Direct Examination.

The plaintiff being duly sworn, testified that he was the plaintiff in the action; that he entered the United States army June 19, 1916, and was then twenty years of age; that his occupation prior to the war was that of a laborer and that he followed kitchen work considerably; that he worked steadily prior to the war; that he had a sixth grade education; that at the time of entering the service he passed a physical examination; that after entering the service he [16] first went to the Mexican border and was there six months; that he returned from the border in December and was transferred into the Federal service; that at this time he was again given a physical examination; that in November of 1917 he applied for and was granted a policy of war risk insurance, this being after he was mustered into the Federal service; that he was detailed on detached service in Sandpoint, Idaho, for a short time and then went to Camp Mills, New York; sailed overseas November 26, 1917, with Company F, 116th Engineers. On arrival in France was transferred to Second Engineers of the Second Division. Went to the front with this organization about the latter part of February or March of 1918; was under artillery fire on several occasions, once at a little town on the Verdun sector where they were constructing dugouts, building fences, building barbed wire entanglements, and so forth;

(Testimony of Thomas Bee Williams.)

that while at the front plaintiff waded in mud night and days, often with no change of clothing; oftentimes slept in the rain; in the open, under fire, or in wet dugouts or cold billets, with no fire in them, and frequently lived on emergency rations; that the shell fire started in about nine o'clock and continued until five in the morning; that once a shell exploded close to the billet; that everybody rushed out and into a trench, other shells exploding close by; that one explosion scattered dirt and stuff on plaintiff and that two men jumped in the trench on top of plaintiff; that the next morning after this experience he was very nervous and his head seemed to ring; that he contracted a severe cough, had sweats and ran a fever and began to lose weight; that he went on sick report and was sent to a French hospital; that he was transferred to French Hospital No. 17, was there a short time and was transferred to American Hospital [17] No. 30 at Royat, France, where he remained approximately 90 days. He then went to Hospital No. 27 at Aigman, where he remained about four months, part of the time in the hospital and part of the time in a convalescent camp; that he saw no improvement in his condition while in the hospital, or in the camp; that he continued to lose weight, had a poor appetite, vomited, had pains in his chest, ran a fever, became very nervous and coughed constantly. That he sailed from France on the 17th day of January, 1919, arriving at Newport News, United States,

(Testimony of Thomas Bee Williams.)

February 2nd. The day he got on the boat he was taken sick and put in the sick bay hospital. Arriving in the United States, he was put in Camp Stewart Hospital; was there about 30 days and then went to Spartanburg, South Carolina, where he was in the t. b. ward. He was transferred from there to Fort Lewis, Washington, and discharged from the army May 28, 1919, and returned to Boise, Idaho. Worked for a construction company about eight days. Quit because unable to hold the job. Then worked in a cafe about a week or ten days. Then worked in the Pure Food Cafe at pantryroom work, handling vegetables and washing dishes; left there on account of sickness. Was examined at Boise, Idaho, and sent to Pierce's Tuberculosis Sanitarium at Portland.

“Mr. FLUENT: I offer in evidence plaintiff's army medical record—or A. G. O. and report from Dr. Pierce's Sanitarium at Portland, Ore.

Mr. DAWSON: I object to Plaintiff's identification No. 1 for the reason it's not a record of the A. G. office—it's a copy of certain entries from the records in the Adjutant General's office, and we have the full report here which we have no objection to if he wants to use it.

Mr. FLUENT: I haven't seen the full report.

Mr. DAWSON: Objection is made to Plain-

(Testimony of Thomas Bee Williams.)

tiff's identification No. 2 for the reason that it includes [18] self-serving declarations made by the plaintiff and more than the physical findings and diagnosis of the doctor.

Mr. FLUENT: All medical reports, your Honor, contain some complaints of the man—complaints *be* made at the time of the findings are not ——

The COURT: Objection overruled as to exhibit 2 and it will be admitted.

Mr. FLUENT: I will substitute these copies containing the Adjutant General's Orders for my Exhibit No. 1.

The COURT: Very well, let it be admitted.

WHEREUPON Plaintiff's Exhibit for identification No. 1, and No. 2, admitted in evidence and become Plaintiff's Exhibits No. 1 and No. 2." (R. 15-16.)

Plaintiff further testified that he was at Dr. Pierce's sanitarium about 40 days; that he was discharged and about January 5, 1920, was sent to Palo Alto, California, to a hospital; was there about two months; was then transferred to Whipple Barracks, Arizona, where he remained about two months, and was discharged from the hospital. Then went to Elcho, Wisconsin, where he worked on the public highway about 15 days. Left this employment because he was unable to do the work; that while working he became weak, coughed and spit blood;

(Testimony of Thomas Bee Williams.)

that drinking intoxicating liquor had nothing to do with quitting the job. That he then worked for the C. W. Fisher Lumber Company about June or July of 1920, approximately 30 days. The work was on the planer floor, taking lumber away from the planer and putting it on cars; that he was able to do this work while he lasted, but was weak all the time he was working, and at times laid off on account of weakness. Left the employment because too sick to work. His condition was weak and he could not carry on.

In 1921 he went to Johnson City, Tennessee, to the Old Soldiers' hospital. Was sent there by the United States [19] Veterans Bureau for tuberculosis treatment; was there about 15 days; returned to Chicago and entered the hospital at Camp Drexel on Drexel Boulevard and remained there a few days and then returned to Cavor, where he remained about a year, doing nothing. Moved to Crandon, Wisconsin; worked three or four days for one Fred Zane sawing wood. In December, 1923, moved his family to Yakima, Washington; lived there until the spring of 1924; went to work for the Cascade Lumber Company; worked about two weeks, taking lumber away from the re-saw. Took sick on the job and quit on account of a weakened condition. Had dizzy spells and fell on the job.

“Q. Why?

A. I was sick.

(Testimony of Thomas Bee Williams.)

Q. Did you drink any liquor at that time while on that employment?

A. Yes.

Q. How much and in what way?

A. Oh, I took a couple of drinks a couple of times.

Q. Did that have anything to do with your losing the job?

A. No.

Q. Did it have anything to do with your being sick?

A. No." (R. 21.)

In May of 1924 was sent to the Walla Walla hospital and was diagnosed tuberculosis, active. Was in and out of the hospital two or three times between May of 1924 and March of 1925. Was in about two weeks the first time; returned to Yakima; worked in August, 1924, for Mr. Day about six or eight days; was taken sick, coughed, spit up considerable blood; was unable to continue employment. Went back to the hospital in Walla Walla and stayed until the 25th day of March, 1925. Returned to Yakima, worked for a man by the name of Jackson two or three days; quit because he couldn't stay on the ladder; job was there for him if he was able to work; was too nervous to stand on the ladder; seemed [20] to shake all the time.

In the fall of 1925 he returned to Elcho, Wisconsin; went to work for Jagerson Fuel Company;

(Testimony of Thomas Bee Williams.)

not over ten days at the longest time; quit this work because he was sick; work consisted of tying edgings in the lumber yard and taking wood away from the convoys into the box cars; worked for the C. W. Fisher Lumber Company in the spring of 1926 for about 30 days. Left that employment because of condition; was in a weakened condition; had pains in side and chest and spit blood. Went to the hospital at the Soldiers' Home, at the National Soldiers' Home of Wisconsin, out of Milwaukee. Was in the t. b. ward for a few days and was then transferred to the Soldiers' Home department. Was there about two months and returned to Elcho. Did no work. It was January of 1927 when he returned to Elcho.

Worked for the Connor Lumber Company in the spring of 1927 about forty days; took sick; same weakened condition; couldn't carry on; quit this employment and went to work for [21] the Lake Shore Lumber Company at Washburn, Wisconsin. Was there about 15 days, then went to Eau Clair, Wisconsin; worked for the Lane Canning Company about 16 or 18 days; quit because too sick to work; hours too long. Was taking away cans from the cooler as they came out in the basket, wheels on it; would take these containers and deliver to different parts of the building. This was day work. Worked sometimes during the night. After quitting this employment he returned to Yakima where he worked for Mr. Fred Jackson; worked

(Testimony of Thomas Bee Williams.)

for a man by the name of Rayburn in the fall of 1927 during the fruit season, worked about a week, washing apples, lifting them back and forth. Was unable to do this work. That his parents were living in Yakima at this time. After leaving Rayburn's employment he didn't work again until the spring of 1928, then worked for Jackson and Cavanaugh at the Moxee Orchards; lived there about two years; considered it his home. Worked on several occasions for Jackson and Cavanaugh short periods; would have to lay off on account of sickness. Didn't work over 90 days in the two years. That his parents came to Yakima in the fall of 1928 and moved away again in the spring of 1930; that he left Yakima in the summer of 1928 and went to Portland, Oregon, where he was hospitalized from about September 2nd until October 16th; that the same old conditions as to health were present during this time. He returned to Yakima, worked a few days at Moxee; returned to Portland about the 6th of November, 1928, and worked in the Veterans Bureau hospital in the kitchen until the 3rd of December. Quit work on account of weakened condition; did no more work that winter. Went to the new hospital at Portland about January 5, 1929; was discharged the 2nd day of February, 1929, and returned to Yakima; worked for [22] Jackson and Ridge at Moxee Orchards in the spring, summer and fall of 1929; worked again for Jackson in 1930, about June or July, for a period of possibly two

(Testimony of Thomas Bee Williams.)

weeks; was unable to do work. Then worked for a man by the name of Kilgore near Jackson's place, in 1931, for about eight days; had pleurisy pains in chest, weakened down and quit this on account of sickness.

He has two daughters, one ten and one twelve; that he was under the care of Dr. Ganson at Yakima; that Dr. Ganson is now dead. That he also saw Dr. England and a Dr. Smith, the county doctor. That he went to the Washington Tuberculosis Association and the doctor there examined him; that this doctor's name was Balingier; that this was in 1924; that his physical troubles still bothered him; that he is still losing weight, has night sweats, coughs considerably, raises lots of mucous, often with blood, heart bothers him, pains in chest and fever; sleeps hardly at all, and was nervous all the time. Made two attempts to work at thinning apples since 1931; worked for a Mr. Greeting for about two weeks, and for a man by the name of Ames at Selah; quit these jobs on account of sickness; never lost any jobs on account of drinking.

That when he enlisted in the army he weighed 149½ pounds, stripped; that he reached a weight of 167 or 170 pounds while in the army; that he now weighs 145 pounds.

Plaintiff then identified Exhibit No. 3, a picture of himself taken in June of 1917 at Priest River, Idaho. Exhibit No. 3 admitted.

(Testimony of Thomas Bee Williams.)

He further testified that he drank occasionally, took one or two drinks; sometimes four or five; that he was not able to drink large quantities of liquor; that he drank [23] because he became nervous, exhausted and discouraged, and couldn't control himself and took a drink to forget it. That he has nervous convulsions and becomes unconscious; that he has these convulsions whether he drinks or not; that drinking checks his feeling of nervousness; that he started drinking to get intoxicated in 1920; that it took 4 or 5 drinks to make him intoxicated; that sometimes it would be two weeks, sometimes a month, sometimes three or four months that he would go without taking a drink; that the periods between drinking are shorter now than they were in 1922 and 1923.

Cross Examination.

Plaintiff testified that at the time of his discharge May 28, 1919, he was given a physical examination by the medical staff of the United States army; that there were several doctors and he didn't remember how many; that he was then released from the hospital just before his discharge; that he then went to Boise, Idaho, and started working on a construction job where he worked about eight days; that he was taking brick off the old Central School building and loading them into a wagon, and shoveling the debris into wagons. That he then went to Pierce's Sanitarium in August of 1919; that he was dis-

(Testimony of Thomas Bee Williams.)

charged and went to Palo Alto and from there to Whipple Barracks, Arizona; that he was in Whipple Barracks and Palo Alto about three months.

“Q. You had some trouble down there and you were discharged for being drunk, weren't you?”

A. That was the charge, yes.” (R. 37.)

That he was in several hospitals after leaving Whipple Barracks; that the next hospital he was in in 1921 was in Johnson City, Tennessee; that he did not remember having any trouble at that place; was there not over two weeks; [24] that he went A. W. O. L. from Johnson City after he had been there about two weeks; that he was in the Drexel Hospital in Chicago in 1922 about thirty days; that he doesn't remember whether it was for observation or treatment; that in 1920 he was married, but isn't married now; that he doesn't remember of being in any hospitals in 1923, but was in Walla Walla hospital, Washington, a short period in 1924.

“Q. And you went to that hospital to find out if you had anything wrong with you, did you not?”

A. They sent me there with T. B.” (R. 40.)

That he went A. W. O. L. in Walla Walla the first time he was sent there; that he was returned again that same year, but doesn't remember how long he stayed.

(Testimony of Thomas Bee Williams.)

That he lived in Elcho, Wisconsin, in 1920 and that he was married there; that he did some drinking in 1920; that he lived part of the time in Yakima and part of the time in Elcho, Wisconsin, through the years 1920 to 1932; that he would stay a few months each year in Elcho, Wisconsin, or Devorre or Cranston; that he went back to Elcho in 1925, and lived there through 1925, 1926 and a part of 1927; was in Yakima in 1928. He wasn't in Elcho in 1929, or 1930, or 1931, but was in Elcho in the fall of 1932.

That he knows men by the names of Harry Telfer, Rich Snyder and Nick Visser; that these men knew him while he was living in Elcho, Wisconsin; that he knows a doctor by the name of Paul J. Dailey, who examined him two or three times at Elcho, Wisconsin, in the summer of 1920. He also saw Dr. Dailey a number of times on the street in Elcho; that he saw him quite often. That he drank some while he was in Yakima in 1924; that he was in the Walla Walla hospital in March of 1925 and was discharged for drunkenness. He returned to [25] Yakima and then to Wisconsin in the fall of 1925; that he worked loading slabs on cars for Jagerson at Elcho, Wisconsin, in the year 1926.

Plaintiff then identified Defendant's Exhibit A as to the signature on the bottom being his signature.

That Exhibit A was a claim for lost wages for twelve days at \$2.65 a day while reporting for

(Testimony of Thomas Bee Williams.)

physical examination, but doesn't remember whether this was because of a layoff while working at Jager-son's; that he received \$31.80 for reporting at Milwaukee at the Soldiers' Home for physical examination.

Plaintiff further testified that he knows a Dr. C. O. Decker, living in Wisconsin, and he also knew a H. W. Hanson living at Elcho.

That he went into the vocational training for a while in the winter of 1922 or 1923 at Nauvoo, Illinois; that he followed this vocational training 17 or 18 days and quit of his own accord.

That he doesn't remember whether he was intoxicated at Yakima on July 12, 1924, or February 2, 1925; that he couldn't remember any dates when he was intoxicated or fined, but that he had been in jail there at different times for drunkenness on dates that he could not remember; that he had been arrested for drunkenness at Yakima, approximately twenty times; that the date of his last arrest for drunkenness in Yakima was August 2, 1933; that he wasn't intoxicated while in the Walla Walla Hospital in July, 1929; that he has been intoxicated a number of times in Wisconsin; that it wasn't his practice to work a few days in the apple orchards and get a little money and spend the money for whisky; that he made him home on the Jackson ranch for two or three years; that he [26] worked there occasionally, picking apples; that he frequently walked up and down the street in Yakima known as the Skid row.

(Testimony of Thomas Bee Williams.)

The Court then instructed the jury that the purpose of admitting the testimony concerning the use of intoxicating liquor by plaintiff was for the purpose of shedding light on the extent to which he indulged in the use of intoxicating liquors, the effect it might have on his health and not for the purpose of impeaching or discrediting him as a witness; that the indulgence in intoxicating liquor is a petty offense, not regarded in law as impeaching the character of the witness.

Re-Direct Examination.

Plaintiff testified that Dr. Dailey and Dr. Decker were both his private physicians and charged him a fee at the time they visited him in Wisconsin.

Plaintiff then identified plaintiff's Exhibits Nos. 4, 5 and 6 as documents relating to his vocational training; and plaintiff's Exhibit No. 7, also identified, being a voucher for loss of work claimed in July of 1929.

Plaintiff then offered in evidence plaintiff's Identification No. 8, being the medical reports taken from the Veterans' files of Thomas Bee Williams.

Objection to the introduction of these files contained in Identification No. 8, was interposed by the Government on the ground that paragraph five of the report of physical examination on January 13, 1920, contained self-serving declaration by the plaintiff and was not a part of the physical finding by the physicians, and paragraph 11 is a prognosis of the doctor, and questions Nos. 13, 14, 15, 16, 17 and

(Testimony of Thomas Bee Williams.)

18 relate to no part of the doctor's physical findings, but refer to the prognosis and the opinion of the doctor not based on his findings. [27]

Whereupon the Court admitted that portion of the medical reports in so far as they are confined to the examinations made by the physicians and the findings of the physician as the result of the examination and excluded the portions of the physical examination reports not within those limits.

At this point it was stipulated between counsel that those portions of plaintiff's Exhibit No. 8 held to be competent should be read to the jury later in the trial.

ELMER DAY,

called as a witness for plaintiff, testified on

Direct Examination.

That he knew plaintiff; that plaintiff worked for him eight or ten days in August of 1924 or 1925; that he was sober while on the job; that he noticed that he was in a weak and run down condition and had to quit; that the last day or two he worked he coughed a little; that he would have continued him in his employ if plaintiff hadn't quit; that he saw him at his house the next morning after he took him in town; that plaintiff was in bed, all in and had a slight hemorrhage; spit blood in the waste paper basket.

(Testimony of Elmer Day.)

“Cross Examination

“By Mr. DAWSON:

Q. That was the first time you knew him?

A. The first time I knew him.

Q. Did he work for you only the one time?

A. Only time to my recollection.

Q. Have you come in intimate contact with him from that time on?

A. No—I saw very little of him since.

Q. The plaintiff was a rather heavy drinker, was he not?

A. I couldn't tell you—I never was out with him.

Q. Do you remember talking to the Department of Justice investigators with reference to this case?

A. There was a man seen me last fall some time about it—I don't remember who he was.
[28]

Q. Didn't you talk with a Department investigator a week or ten days ago about this case? A. No.

Q. You don't remember telling the Department of Justice investigator this man was a heavy drinker?

A. He spoke of his drinking—propably he did—he didn't drink to my knowledge any time he was with me.

Q. You didn't state he was a heavy drinker—drinking anything he could get his hands on?

A. No.

(Testimony of Elmer Day.)

Re-Direct Examination

By Mr. Fluent:

Q. What kind of work was it you had him doing?

A. Making mortar, carrying brick.

Q. Why was it he had to quit? Was it drinking caused him to quit his work?

A. No, he simply weakened and couldn't stand it—I don't think it was drink caused it—he hadn't been drinking any while he was working for me."

FRED JACKSON,

called as a witness on behalf of plaintiff, testified that he had known plaintiff since 1924; that plaintiff worked for him in 1924 and in 1931; that he figured plaintiff had worked about 120 days for him altogether, not more than two or three weeks at any one time; that plaintiff was sober during the time he was employed by witness; that he complained of his lungs and pleurisy in his side and that he had noticed plaintiff spit blood; that he did his share of work on the job, but sometimes had to quit; that he never gave plaintiff any heavy work; that he would work sometimes three days, sometimes a week, and then quit. That he quit sometimes on account of weakness; sometimes he quit at night; sometimes

(Testimony of Fred Jackson.)

at half past ten in the morning; that had plaintiff been able to work, he could have worked from March to November, both in 1928 and 1929.

“Q. How much work would you say he could have done—that you would have had him do had he stayed at the work there over that period of time from '24 to '31?

A. Oh, I imagine three years.” (R. 60)

On Cross Examination

the witness testified that he was operating an orchard in the Yakima Valley in conjunction [29] with his brother; that in 1924 they were running their mother's ranch and in 1926, 1927 and 1928 he was running by himself. That plaintiff worked well when he worked. He remembered in 1929 plaintiff quit work one morning at half past ten; that plaintiff was sick; that he never saw plaintiff drunk but once, and that wasn't while he was working; that he saw him drunk out at Fruitville, but not while plaintiff was working for him; that he knew plaintiff was in jail frequently for drunkenness, but he didn't know how many times. That plaintiff frequently told him when he had been absent, that he had been in jail, arrested for drunkenness, but claimed that sometimes he wasn't drunk. That he and his family were very close friends of the plaintiff's, and he felt very sympathetic towards plaintiff and tried to help him all he could.

W. F. WILLIAMS,

called as a witness on behalf of plaintiff, testified that he was the father of plaintiff; that prior to the war plaintiff worked as a delivery boy for a store and as messenger for the Western Union; that he also [30] worked as a pantryman prior to the war; that plaintiff lived at home prior to the war; that he saw him shortly after he came back from the army and just before he was discharged; that at that time plaintiff looked quite cut down and didn't look as husky as he used to; that he had seen a lot of plaintiff since they moved to Yakima; that he lived near the Jackson place at Yakima; that plaintiff couldn't stand anything. He would work a little while at a time and then have to lay off; that plaintiff spit blood at times, complained of shortness of breath and so forth; that he was drinking some of the time at home, but would lay off for long periods of time. That plaintiff was very nervous, would almost go into convulsions at times.

On Cross Examination

witness testified that he was living on the Jackson and Cavanaugh ranch; that he came from Wisconsin to Yakima in 1923; that he had lived in Yakima for fourteen years straight; that plaintiff and his wife moved out here and then went back to Wisconsin; that they split up and plaintiff's wife went back home; that he judged that plaintiff spent about twenty per cent. of his time back in Wisconsin after they had come out to Yakima.

DR. C. R. DUNCAN,

called as a witness on behalf of plaintiff, testified on

Direct Examination,

that he was a physician and surgeon, graduate of the State University of Iowa about 1909; has been engaged in the practice of medicine ever since; licensed to practice in the State of Washington and carrying on a practice in Yakima; that he has handled cases of tuberculosis in his practice; that he had examined plaintiff about two or three weeks prior to the trial and once about two or three years prior to the trial; that on the last examination he examined his heart, lungs, nervous sys- [31] tem, but that no X-rays were taken of the chest. Upon voir dire examination by the defendant, witness further stated that in taking the examination he had taken a history from plaintiff; that he knew this case was pending in court and that he made this examination for the purpose of qualifying himself to testify as an expert in the case. That to a certain extent he took the plaintiff's history into account in making the diagnosis and that that constituted a part of the diagnosis.

Objection was then interposed to the testimony of the witness giving an opinion or a diagnosis of plaintiff's condition upon the ground and for the reason that the said diagnosis was based on a self-serving declaration and history given by the plaintiff himself.

Objection was overruled.

“Q. What history did he give you?

Mr. FOX: To which we object—

(Testimony of Dr. C. R. Duncan.)

The COURT: And the objection is sustained.

Q. What were your findings? (R. 69)

The witness then stated that he found tubercular breathing throughout both lungs, more perceptible on the right side and upper right side; that there was a certain amount of soreness which indicates that he has had in the past a severe inflammatory condition of the chest that has given rise to a filling in of fibrous tissue and disturbance to the lung tissue.

The witness further stated that from these findings he was able to diagnose the condition and that in his opinion plaintiff was suffering from a chronic tubercular condition; that it was in an advanced stage, but not active at the present time; that he prescribed that the plaintiff should not work at hard labor or expose himself and should live a quiet, easy life; that rest is essential at all times in the treatment of tuberculosis; that labor would aggravate his condition; that, in his opinion, the man should never engage in hard [32] labor; that he couldn't engage in work of any kind continuously.

The following hypothetical question was put to witness:

Q. Bearing in mind this definition of permanent and total disability—an impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, when such disability is founded

(Testimony of Dr. C. R. Duncan.)

upon conditions which render it reasonably certain that the same will continue through the life of the person suffering from it, and also, bearing in mind the examination you made of Thomas Bee Williams, and assuming these facts to be true for the purpose of this hypothetical question; assuming that Thomas Bee Williams went as far as the 6th grade in school, and his occupation prior to entering the military service was that of laborer and pantry man—that he entered the military service on the 19th day of June, 1916, at the age of twenty years, after he was given a physical examination for entrance into the military service and was accepted, and shortly after entering the army he was sent to the Mexican border where he remained for about one year—rather where he remained for six months; that he went over seas in 1917; that he was engaged in active service with Company “F” Second Engineers from December, 1917, to May, 1918; that he was on the Verdun front; that his duty was near the front line; that in June, 1918, he was sent to a French Hospital with congestion in the apex of the right lung; and from there was transferred to base hospital No. 30, where he remained until August 14, 1918, with suspected incipient pulmonary tuberculosis, and bronchitis, acute, catarrhal; that he was then sent to base hospital No. 27, and [33] remained there from August 28, 1918, to October 22, 1918; he was then placed in a convalescent camp where he remained about three months, and was

(Testimony of Dr. C. R. Duncan.)

then sent to St. Nazarre, France, where he embarked for the United States on January 17, 1919;

That he took down en route and was in the sick hospital on the boat and upon debarkation he was placed in the hospital at Newport News, Virginia, from February 2, to February 27, 1919, on account of tuberculosis pulmonary, chronic, active, middle and upper right and left apex, and from there was transferred to the United States General Hospital at Spartanburg, South Carolina, where he remained from February 28, 1919, to May 7, 1919, on account of tuberculosis, pulmonary, chronic, and from there he was sent to United States base hospital, Camp Lewis, Washington, where he remained until he was discharged from the army May 28, 1919. After his discharge he went to Boise, Idaho, and worked for about eight days for a construction company, and about twenty days in two restaurants; that in August, 1919, he was sent to Pierce Sanatorium in Portland, Oregon, where he remained about two months; that two or three months thereafter he was transferred to United States Public Health Hospital at Palo Alto, California, where he remained about three months, when he was transferred to Whipple Barracks, Arizona, where he remained for two months; that in July, 1920, he worked for a lumber company at different times, totalling about *onw* month; that in July, 1921, he was transferred to the Old Soldiers Home at Johnson City, Tennessee, for two weeks; that he was

(Testimony of Dr. C. R. Duncan.)

a patient in the United States Public Health Hospital, No. 30, at Chicago for about a month in February and March, 1922, and for about a month a year later on account of tuberculosis; that he entered vocational training at Nauvoo, Illinois, and discontinued after [34] eighteen days; that thereafter he worked for the Cascade Lumber Company at Yakima in the spring of 1924 for about two weeks, and for Elmer Day at Yakima about ten days in the spring of 1924; that he was admitted to the United States Veterans Base Hospital at Walla Walla on May 5th, 1924, on account of tuberculosis, active; that he then worked for a short time for Fred Jackson at Fruitville, Washington, in the fall of 1924 and in the same fall went to the United States Veterans Bureau Hospital, at Walla Walla on account of his tuberculosis and remained for about a month; that he again entered this hospital in February, 1925, and was discharged one month later, in March, 1925; that he worked for a fuel company in Elcho, Wisconsin, for ten days in the winter of 1925 and for the Fish Lumber Company about ten days in the spring of 1926 and for the Connor Lumber Company at Leona, Wisconsin, in the spring of 1927 for a short period of time and for the Lake Shore Lumber Company in Wisconsin for a short period of time the same spring; for the Lang Canning Company at Eau Claire, Wisconsin for ten days in 1927 and for Jackson and Hilgore at Moxee, Washington, in the fall of 1928

(Testimony of Dr. C. R. Duncan.)

and '29 for a period of about two weeks; that he was again in the United States Veterans Hospital at Portland, Oregon, for about six weeks in the fall of 1928, on account of his disability; that he worked for Fred Jackson at Naches Heights for at least three weeks in the fall of 1930 and about the same period of time in the fall of 1931; that he worked for one Kilgore about eight days in May or June of 1931; that he was in the United States Veterans Bureau Hospital at Walla Walla for about two weeks in August, 1931 and that he has done no work since the fall of 1931 except a period of six days, or about two weeks; have you an opinion as to [35] whether or not he was permanently and totally disabled at the time of his discharge from the United States Army on May 28th, 1919?

Objection was interposed by the Government on the ground that the hypothetical question did not fairly and accurately set out the matters in evidence, and upon the further ground that the answer called for a statement of ultimate fact and thus invaded the province of the jury, which objection was overruled and exception noted.

The witness then testified that in his opinion plaintiff was totally and permanently disabled at the date of his separation from the service.

Witness further stated that he believed that a case of incipient tuberculosis could be absolutely cured, but that in the case of plaintiff, he believed that a permanent arrest was not possible, and that while plaintiff's tuberculosis might be arrested for

(Testimony of Dr. C. R. Duncan.)

a time, it would break down with fatigue and become active and be so throughout the man's life.

“Cross Examination

“By Mr. Dawson:—

You are a doctor in the general practice of tuberculosis?

A. The general practice of medicine.

Q. And you have not made any specialty of tuberculosis?

A. Yes, sir. A few years ago I took quite an active interest in tuberculosis and have had a great many tubercular patients.

Q. Have you ever been in a hospital in charge or supervision of tubercular patients?

A. No, sir.

Q. You took no special course as far as tuberculosis is concerned?

A. I took a very active interest in tuberculosis and did a lot of advanced work in the reading and history of tuberculosis and took care of tubercular patients here—ten or twelve years ago I had a lot of patients.” (R. 78-9)

The question was then asked: “Can you tell me [36] the American standard for diagnosis of active tuberculosis?”

A. I don't know as I can tell in the exact words. I can tell you the standard for diagnosing tuberculosis.

(Testimony of Dr. C. R. Duncan.)

Q. Can you tell us the five things upon which they base a diagnosis of active tuberculosis?

A. You only need one thing.

Q. What is that?

A. Finding tubercle bacillus.

Q. A man may have active tuberculosis without sputum? A. He may have."

The witness further testified that he did not take X-rays; that he had examined the patient twice and that he probably consumed thirty minutes in making the examination.

He further stated that at the time of the first examination, he made an examination of plaintiff for heart trouble, but that he was positive that plaintiff was tubercular and advised him to do nothing except rest, but that at the time of his recent examination he did not find any active tuberculosis; that arrested tuberculosis meant that the activity was arrested, but that he did not believe that any person having tuberculosis was absolutely cured. You could only speak of him as having an arrested case. That this was a matter of personal opinion of every doctor, and that his opinion was that once an arrested case of tuberculosis flared up, that the patient was out of luck.

"Q. That is your experience?

A. Yes.

Q. Isn't it a fact there are thousands of men with arrested tuberculosis who are working every day?

A. Yes sir.

(Testimony of Dr. C. R. Duncan.)

Q. Isn't it a fact that every member of the Caucasian race has tuberculosis germs in his system?

A. I believe every man or woman has at some time. (R. 81)

Q. Isn't it a fact that active tuberculosis if it once becomes arrested, whatever tuberculosis they [37] have acts as a vaccination against subsequent attacks?

A. To a great extent. If it wasn't for that fact a lot of people would die from tuberculosis that don't die.

Q. And that's the reason the germs having been in the white race so long have built up that immunity, isn't that true?

A. I presume you might say that's true.

Q. That's why an Indian or colored man who gets tuberculosis has no resistance, isn't it true?

A. I don't know." (R. 82-3)

That tuberculosis might be classified as incipient, moderately advanced, and far advanced.

"Now the plaintiff has a diagnosis on the 13th day of November 1925 of tuberculosis minible, arrested—

A. That would be not active.

Q. If this man had had active tuberculosis on the date of his discharge from military service and he was examined in 1925 and found to have tuberculosis minimal and arrested,

(Testimony of Dr. C. R. Duncan.)

there wasn't much activity between 1919 and 1925 would you say?

A. It don't seem so.

Q. If he had a diagnosis on March 25, 1925 of tuberculosis, pulmonary, chronic, moderately advanced, quiescent, would that indicate any activity at that time?

A. You have one "Minimal" and another one "Moderately advanced"—there must have been tuberculosis in the meantime.

Q. Well that depends on the man who examined him?

A. That is just what I am trying to get over.

Q. Now if a man had a diagnosis on June 1st, 1929 of inactive tuberculosis, probably arrested, that would indicate there was no activity at that time, would it not?

A. That man said "probably arrested"—he was guessing too." (R. 83-5)

The doctor further testified that it wasn't necessary to put a patient in the hospital and observe him for the purpose of making a diagnosis of tuberculosis; that the effect of heavy drinking on a tubercular patient would be adverse; but that a moderate use of alcohol would be beneficial; that he could not remember the date of his first examination; that he kept no office notes and that the only treatment he recommended was that plaintiff take life easy; that tuberculosis usually attacks the up-

(Testimony of Dr. C. R. Duncan.)

per lobe of the lung, but that he had found it in other places; that cavities in tuberculo- [38] sis were caused from destruction of the lung tissue, but that it was possible to have tuberculosis year after year and not have cavitation.

On Redirect Examination

the following question was asked the witness:

“Q. If a man is diagnosed on February 19, 1919 and is diagnosed in 1921 pulmonary tuberculosis arrested, moderately advanced, and is diagnosed in October, 1922, pulmonary, chronic, apparently arrested, moderately advanced; diagnosed April 2, 1925, tuberculosis, pulmonary, chronic, moderately advanced, and on March 25, 1925, tuberculosis, pulmonary, chronic, moderately advanced, quiescent—would you say that his condition after that time was in the incipient, moderately advanced or far advanced stage?

“A. At that time I would say he was markedly advanced.” [39]

Dr. J. L. McDONALD

testified on behalf of plaintiff, that he was a graduate of the Medical College of Virginia, 1910 and had been engaged in the practice of medicine 23 years, and was licensed to practice in the State of Washington. That he had examined and treated a large number of cases of tuberculosis; that he worked in the south for a period of three years

(Testimony of Dr. J. L. McDonald.)

when he encountered a great deal of tuberculosis, especially among the colored people; that he examined plaintiff on the 5th day of October, 1933; that he gave a physical examination and fluoroscopic and X-ray examination. He examined plaintiff's lungs with a stethoscope and had X-rays of the chest.

The X-rays were produced and identified, offered and admitted in evidence as Plaintiff's Exhibits 9 and 10. The witness then explained the X-ray pictures; that the X-ray was a picture of plaintiff's chest, pointing out the different organs and lobes of the lungs; that the air passages take black under an X-ray, and that the white streaks in the X-ray was where the air wasn't going into the lung; that a mottled condition was always indicative of tuberculosis; that the picture indicated that the plaintiff had tuberculosis of the lungs and that his condition was one of long standing. That in the examination he found a rale at the base of the mottled lobe on the right side; that rales indicate tubercular activity or mucus in the lung.

From his examination he made a diagnosis of tuberculosis, moderately advanced in both lungs; that the only treatment to be prescribed was going into a dry climate and with mental and physical rest; that absolute rest is essential for the treatment of the plaintiff and that it would be injurious to his health to engage continuously in any kind [40] of work; that his condition was reasonably certain to last throughout his lifetime.

(Testimony of Dr. J. L. McDonald.)

The same hypothetical question as asked of Dr. Duncan was then put to the witness, the same objection interposed by the defendant, which objection was overruled and that witness then testified that plaintiff, in his opinion, was totally and permanently disabled at the date of his separation from the service on May 28, 1919.

On Cross Examination

the witness testified that he examined plaintiff October 5, 1933; that he had seen him once about a year prior to that time; that at the time of the last examination he knew that the case was pending in court and that he examined him for the purpose of qualifying himself as an expert witness to testify in the case. That he had appeared as a witness in a number of war risk insurance cases; that the fee he was to receive for his testimony was contingent upon plaintiff winning the case and that he would not come into court for less than a fee of \$250; that he was engaged in the general practice of medicine.

The doctor then pointed out what he described as the mottling in the X-rays, stating that the normal lung would show black. The question was then asked:

“Q. Doctor, you said you found one rale in the middle lobe?

A. No, you can't find one rale—there are a number—I meant in a small area.

Q. Would you make a diagnosis on tuberculosis on that?

(Testimony of Dr. J. L. McDonald.)

A. Yes, with all the history and physical findings and the fluoroscopic examination and the X-ray on up to the present, I would.

Q. Did you take into consideration his history?
[41]

A. I did take into consideration his history because I knew his history.

Mr. DAWSON: In view of the doctor's statement, I now move his testimony as to physical findings, be stricken from the record, the physical findings the result of October 5, 1933, examination.

The COURT: He said he knew his history.

Mr. FLUENT: Q. Did you render your opinion here in court on your findings from the examination you made of the man.

A. No. All physical examinations consist of history first and the physical examination last. Any man that will examine a person without the history—I don't know what to say, it's one of the rules history first. A person comes into your office and says, "Doctor, I am sick"—"Well, you are sick—how long have you been sick and where are you sick" and he may date that back twenty five years and give you a history all the way up to the present time and you certainly have to take that into consideration.

Q. Could any doctor make a finding that would be correct?

Mr. FOX: I object—

The COURT: The question involved here is a question of law and not a question of medicine. This

(Testimony of Dr. J. L. McDonald.)

physician examined this man not for the purpose of treating him, he examined him for the purpose of testifying in this case. Now it's clearly settled in the books the statements and declarations of a patient made to a physician under those circumstances are not competent because the witness would be disposed to mislead, if he could, or make false statements. He is not consulting the doctor for treatment under such circumstances. [42] The usual examinations of that sort could not be based on the statement of the patient. All you can prove by this physician is what he found as a result of that examination, or if he had a history of the patient from a reliable source other than the patient himself he could go into that.

Mr. FLUENT: I gave the doctor a hypothetical question.

The COURT: Your question was all right but the opinion of this doctor which takes into account, apparently so, unfortunately, what the plaintiff told him——

Q. What are your findings from the X-ray and the stethoscope and fluoroscope and your examination of the plaintiff himself, what are your findings from those examinations:

A. Moderately advanced tuberculosis, possibly active.

Mr. DAWSON: I object to that and move that the answer be stricken for the very reason this doctor said he would have to take into consideration those findings.

(Testimony of Dr. J. L. McDonald.)

The COURT: No—the motion will be denied.

To which ruling the defendant excepts.

The COURT: He didn't have to rely on anything the patient told him after the examination. He didn't have to rely on what the patient told him after what the X-ray showed. He didn't have to rely on what the patient told him as to the rales in his lung—there are many things he could rely on without taking into account the history at all.”

MARGARET MARY CASSIDY,

called as a witness on behalf of plaintiff, testified that she had been a public health nurse since 1918. That she knew the plaintiff; that she was not connected with the Washington Tuberculosis Association, but they furnish clinical service to the public health depart- [43] ment. She recalled that plaintiff was examined in April of 1924 by Dr. Balinger, who is no longer a resident of Yakima. She testified that a record of the examination was kept in the office; that it was a copy of the original, and a copy of the examination report was signed by the doctor. The report of Dr. Balinger's examination was then identified and offered in evidence. Objected to by the Government and objection sustained. Witness excused.

DR. HENRY STORGAARD,

called as a witness on behalf of plaintiff, testified that he was a physician and surgeon, graduated from the Chicago Hospital College of Medicine in the year 1916, and has been engaged in the practice of medicine since that time and licensed to practice in the State of Washington, with offices in the Larson Building, Yakima.

“Q. What experience have you had, Doctor, with the examination, care and treatment of tuberculosis?”

A. About the average experience of the average general practitioner in addition to that of a health officer for five years in a community of this size.” (R. 107)

That he had had experience of a general practitioner, in addition to five years experience as health officer in the community; that he examined the plaintiff first in 1931 and treated him for pleurisy, and that he had examined him on several occasions since, probably six or eight times, physical examinations and had X-rays taken; that the examinations were general in character, including the chest and heart; that he had X-rays taken but did not interpret his own X-rays, allowing some one else to do that for him.

From his examination, including the X-ray, which he did not himself interpret, he had rendered a diagnosis of chronic, moderately advanced, pulmonary tuberculosis, pleurisy and cardiac, hypertrophy. That in his examination he found [44]

(Testimony of Dr. Henry Storgaard.)

moist rales in both upper lobes in the first examination and tubercular breathing, dullness on percussion, the upper part of both lungs, limitation excursions of diaphragm; limited expansion on breathing and pain on inhalation, particularly on the right side in the chest wall; that he would prescribe rest, good nourishing food, get up in a high altitude and take a little medicine occasionally; also see a physician about every two or three months; keep a check on this heart condition and the progress of his case; that in his opinion it would be injurious for plaintiff to engage in any kind of work continuously, and that performance of labor would result in breaking down too much of the lung tissue.

In his opinion, plaintiff's disability was reasonably certain to last throughout his life.

The same hypothetical question as put to Dr. Duncan and Dr. McDonald, was then propounded to witness, the same objection made by defendant and overruled by the Court.

In answer to this hypothetical question, the Doctor gave as his opinion that plaintiff was totally and permanently disabled at the date of his discharge from the United States Army May 28, 1919.

On Cross Examination

the Doctor testified in substance: That he had examined plaintiff first in 1931; that the examination took 15 to 20 minutes; that it was made in his office; that on the subsequent occasions he had just looked over plaintiff, probably four or five minutes and

(Testimony of Dr. Henry Storgaard.)

strapped up his chest; the strapping up of his chest was for pleurisy. That pleurisy was a very common condition to find in tuberculosis; that the fee he was to charge for his testimony was not contingent on the outcome of the law suit; that [45] he had been paid for his medical services, but had not been paid his witness fees; that he was charging the plaintiff for his testimony whatever the plaintiff chose to pay; that he found the plaintiff's tuberculosis in 1931 active; that he had no record of his examinations; that his files and records had been lost and he was testifying from memory absolutely; that the records had been lost between the first day of September and the first day of October, 1933; that he found active tuberculosis in 1931; he did not report it to the health board.

“Q. When you found this plaintiff active in 1931 did you report that to the State Board of Health? A. No sir.

Q. You didn't report it?

A. It was reported before that.” (R. 114)

DR. ROYAL B. TRACY,

testified on behalf of plaintiff; that he was a physician and surgeon, graduated from the University of Missouri in 1908; that he was licensed to practice medicine and surgery in the State of Washington; that he had been in the medical corps during the World War about 22 months; that his first duty

(Testimony of Dr. Royal B. Tracy.)

was on the front line, but he was transferred to the base hospital where he observed the effect of shell shock and mental injury to the soldier; that he specialized in nervous and mental diseases; that he had specialized in that branch for about 16 years.

“A. After I was discharged from the service in 1919 on June 30th, I received appointment as Contract Physician, consulting neurologist for the Veterans’ Bureau at Albuquerque, New Mexico. I held that position for a period of two years.

Q. What did you do after that?

A. I was with the state hospital for the insane in New Mexico for a period of two years after leaving the Veterans’ Bureau service at Albuquerque, afterwards I was consulting neurologist for the State Hospital at Warm Springs.

Q. When was that?

A. That was in 1923 and ’24 and a part of ’22. I held the position of Associate Supervisor which really [46] means I held the position because of the fact that the Supervisor himself wasn’t a specialist in insanity and nervous diseases.” (R. 116)

That he left Montana in 1924 and took his State Board here in Washington and within six months he was appointed consultant in the King County hospital for nervous diseases; that he held that posi-

(Testimony of Dr. Royal B. Tracy.)

tion for a period of 21½ years; that during the same period he was a member of the Department of Industry for the State of Washington and was consultant for nervous and mental diseases during the same time he was a member of the King County Insanity Commission which he held for a period of five years in Seattle; that he examined plaintiff for the first time on the 14th or 15th of August, 1931, and that he had examined him again at Yakima just a few days previous to the date of his testifying; that the purpose of the examination was to determine plaintiff's mentality and nervous [47] condition; that he made a complete mental and nervous examination of plaintiff, which consisted of a series of tests used to determine the reaction on all the different muscular structure of the body, especially symptoms and everything pertaining to the nervous system. It consisted of a series of questions connected with determining whether the man had delusions or hallucinations, and further consisted in testing out the nervous structure of the individual as to responsibility and that he had made numerous tests of the plaintiff, all the tests which he made in every standard examination for neurology; that he spent the whole of one afternoon making these tests; that he gave plaintiff a test known as Sargeant's White Line Test and as a result of his examination and the test positively concluded that plaintiff was suffering from asthenia which means a general weakening of the greater muscular physical system;

(Testimony of Dr. Royal B. Tracy.)

that asthenia is a nervous condition and always associated with neurasthenia; that neurasthenia means complete physical and nervous exhaustion of the system brought on as a result of severe mental shock or physical shock, or both; that the Sargeant's White Line test is made by taking a pencil *of* a blunt object of some sort and striking it across the chest, and usually by striking it across the abdomen. In a normal being the reaction to that is a red spot that remains for a short time and completely disappears without any sign or evidence of any kind left. According to the degree of exhaustion, this line remains and gets darker and darker until it finally disappears. The witness testified that he had known cases where it lasted as long as an hour; that in plaintiff's case the line lasted about an hour; that the test is a positive one and that poisons generated from active tuberculosis would affect the nervous system; that the condition of neurasthenia found [48] from his examination is a permanent condition and that even without tuberculosis plaintiff would not be able to work.

“Q. Is that condition you found from your examination one that is reasonably certain to remain the remainder of this person's life or is it curable?”

A. It is a permanent condition.

Q. Will this man ever be able to follow a gainful occupation continuously?

A. Never, even if he did not have tubercu-

(Testimony of Dr. Royal B. Tracy.)

losis would he be able to stand up under the effort.

Q. Would it make his condition worse or not to engage in work?

A. As I said, it would be impossible for him to do any kind of work." (R. 120)

Counsel then propounded the same hypothetical question as that given to the other doctors who had testified on behalf of plaintiff. The same objection was interposed by defendant and overruled and exception taken, and the doctor, in answer to said question gave as his opinion that plaintiff was totally and permanently disabled at the date of his separation from the service May 28, 1919.

On Cross Examination

the witness testified that he had testified as an expert witness in a large number of war risk insurance cases; maybe 15 or 20; that he had made no particular arrangements about his fee for testifying in this case; that he did have an understanding that he would be paid a reasonable fee for his services and that his fee in the case was to be contingent upon the winning of the suit; that if plaintiff did not win the law suit witness would get nothing; that in the event he won the law suit the amount he received would be up to plaintiff, but that he expected to have adequate pay for his services and that his services cost money.

(Testimony of Dr. Royal B. Tracy.)

On further Cross Examination he stated that he would expect at least \$300.00 as a fee.

“Q. Where do you practise at the present time? [49]

A. In Seattle.

Q. How long have you been practicing there?

A. In that office about eight months.

Q. Where was your office prior to the one you occupy now?

A. I was in the Green Building.

Q. In Seattle?

A. Yes.

Q. When did you give up your office up there?

A. I gave the office up there about—I can't recall just the time, but I haven't had an office in Seattle for a period of about two years.

Q. But you have been practicing medicine in Seattle?

A. I have been taking care of regular cases, and acting as expert witness.

Q. Isn't it a fact you have had practically no medical practice except appearing as an expert witness in court?

A. I have had medical practice. I didn't maintain an office in Seattle because I prefer to live in another part of the country—right across the Sound.” (R. 124)

(Testimony of Dr. Royal B. Tracy.)

On further Cross-questioning, the doctor testified that he knew the cause of plaintiff's neurasthenia; that it was the result of shell shock sustained by the plaintiff while [50] in the service, due to the explosion of bombs and shells; that he did not have to have a history in this case; that he could tell from his examination about the length of time it would take his neurasthenia to develop; that he had found plaintiff suffering complete exhaustion of the suprarenal gland which means that the gland has no ability to restore itself whatsoever; that he had given plaintiff the Sargeant's White line test and caused him to go through certain movements, jumping up and down and holding his hand out to see if it trembled, or not. That it was his opinion that plaintiff's condition was incurable, because there had been complete exhaustion of the suprarenal gland; that he could not tell from his examination when this gland had become totally exhausted, but that he could surmise from the history of the man, being exposed to artillery fire and exposure, that he was of the opinion that the man now had a pnychosis; that the long continued use of alcohol might affect plaintiff's stomach and might affect him mentally, but that it didn't have an adverse affect on a man's nervous system; that undoubtedly one of the best treatments for a neurasthenic patient was to give him a drink occasionally.

(Testimony of Dr. Royal B. Tracy.)

On Re-direct Examination

witness further testified that he did not think plaintiff's health had been affected by drinking, for the reason that plaintiff had a very good memory; that he considered plaintiff's memory exceptional. That he could not say how much liquor it would take to cause plaintiff to become intoxicated, but that ordinarily a nervous person required but little liquor to become intoxicated, but that in his opinion nothing that plaintiff could have done would have changed his condition of total and permanent disability after he was discharged from the army. [51]

On Re-cross Examination,

witness further testified that a neurasthenic patient having tuberculosis would have lived in a depleted state and could never be normal again, even though the tuberculosis was arrested; that the effect of shell shock is to produce what is known as amnesia in which a patient has been known to actually forget his name.

Witness excused and plaintiff rested his case, at which time the Government moved for an order of non-suit against plaintiff, or, in the alternative, a directed verdict on the ground and for the reason that plaintiff had failed to establish by a fair preponderance of the evidence, that plaintiff was totally and permanently disabled by reason of pul-

(Testimony of Dr. Albert C. Feaman.)

monary tuberculosis, chronic, active, chronic bronchitis, chronic myocarditis or neuresthenia at the time when his war risk insurance was in force and effect, which motion was denied and exception allowed to the defendant.

Dr. ALBERT C. FEAMAN

was called as a witness on behalf of defendant, and testified that he is a physician and surgeon, a graduate of the University of Minnesota in 1919; that he specialized in heart and lung diseases since his graduation; that he was resident physician for the Municipal Tuberculosis Sanitarium from 1919 to 1922, at Seattle, and after that was one year in Portland, Oregon, for the United States Government in charge of heart and lung diseases for the sub-district of Portland; that he was three months in Boise, Idaho; that he took a post graduate course in New York in January and February, 1925, and in September took another post graduate course, and since that time I have been continuously in charge of the regional office at Seattle for the United States Veterans Administration for heart and lung diseases; that he examined the plaintiff August 11, 1931; [52] that he made a heart and lung examination; that he found his blood pressure, pulse and respiration normal; that from his examination he diagnosed plaintiff as having pulmonary tuberculosis, chronic, moderately advanced, healed, with chronic bronchitis, moder-

(Testimony of Dr. Albert C. Feaman.)

ate; that bronchitis is not an unusual disease, especially for persons living in moist atmospheres; that it is not a disabling disease nor fatal; that at the time of his examination on August 11, 1931, he found no evidence of active tuberculosis.

Witness then examined plaintiff's X-ray pictures and stated that he had broad experience in studying X-rays and making diagnoses of the lungs from X-ray pictures, and that the mottling referred to in the pictures did not indicate tuberculosis and that there was nothing appearing in plaintiff's X-ray pictures from which a diagnosis of tuberculosis could be made.

“Q. Based upon your examination of the plaintiff on August 11, 1931, and your findings at that time, what is your opinion as to his ability to follow some gainful occupation at that time?

A. Well, I will have to explain that by stating there are five different things representing treatment of tuberculosis. I will say that a sixth has been added now. First, in the beginning of the treatment I always recommend rest in bed; second, good food; third, continuous twenty hours in the open air where the individual has the opportunity for rest without exercise; fourth, his mental outlook, keeping cheerful and in a bright frame of mind, read good books, and see good things; fifth, exercise, this is a part of the end treatment, walking and little jobs. Around the Seattle Sanitorium each man

(Testimony of Dr. Albert C. Feaman.)

is assigned certain forms of work as a constructive program, to keep the mind in a happy condition so they feel they are honestly earning something, producing something, earning their way. Exercise consists in making them walk by gradually increasing the time up to a mile, two miles, three miles, four miles, and so forth. Now, the sixth is surgery, a removal of the ribs for collapse of lung permanently, and artificial pneumothorax collapse partial by air pneumolepsis phrenectomy * * *. Now, I say exercise is as valuable on the other end of the treatment as rest is in the beginning. It hardens the fibrous deposits around the tubercles as well as giving muscle tone to all of the muscles of the body. [53]

Q. Well, doctor, then you found an arrested condition?

A. That is how I classified it, yes.

Q. What is your opinion as to his ability to follow a substantially gainful occupation?

A. I think there are many occupations he could follow and which would very much improve his mental attitude.

Q. The fact that a man is suffering from—may have had tuberculosis is that an indication he cannot perform labor?

A. We don't recommend hard mental labor, like long shoring or digging but lighter forms of work certainly are indicated.

Q. Doctor, from your examination of the plaintiff in August, 1931, what is your opinion

(Testimony of Dr. Albert C. Feaman.)

as to whether or not he was permanently and totally disabled from any heart or lung condition at that time?

A. I think I stated it was arrested tuberculosis, no cardiac pathology, and no permanent and total disability." (R. 137-8)

On Cross Examination

the witness testified that the excessive use of liquor would have an injurious effect upon a chronic heart affection or any other chronic disability; that it was probable that engaging in work would reactivate or cause a reaction of the tuberculosis. But that a person suffering from tuberculosis which had been arrested by treatment, could engage in light labor; that he had seen patients in all three stages, that is, in far advanced tuberculosis, able to drive taxicabs in Seattle and making a good existence; that he did not make an examination of plaintiff with reference to insurance; that his examination was made for the purpose of determining whether the plaintiff was entitled to compensation and whether he needed treatment, and that he had no interest in the court actions; that at the time he examined plaintiff, witness had the prior examination file before him; that chronic neurasthenia might cause the patient to be some weaker and be detrimental to one suffering from tuberculosis.

Dr. A. D. TOLLEFSON

testified on behalf of defendant, that he was a graduate of the Northwestern Medical School [54] in 1910; that he had been engaged in the practice of his profession since the date of his graduation; that he specialized in diseases of the chest since 1922; that he is at the present time in the United States Veterans hospital at Walla Walla, which is a general hospital; that he had examined plaintiff in Seattle in February, 1924, giving him a chest examination only; that plaintiff was given the usual chest examination;

“Q. What were the findings?

A. No essential findings at the time I examined him—my impression is the physical findings did not indicate any t. b.—that is my impression of the case.

Q. You found nothing to indicate the presence of tuberculosis?

A. No.

Q. Doctor, based upon your observation and examination of the patient at that time what is your opinion as to the ability of the plaintiff to follow some gainful occupation?

A. Certainly if I didn't find anything wrong with his chest there could be no reason why the man couldn't successfully carry on in any occupation.” (R. 144-5)

Upon Cross Examination

the witness testified that he examined plaintiff on the 19th day of February, 1924; that he found no

(Testimony of Dr. A. D. Tollefson.)

clinical evidence of pulmonary tuberculosis.

“Q. Did you have before you the examinations and diagnosis of previous medical examinations?

A. Yes, as a rule if the patient had his claim filed in the Regional office in Seattle with the request for examination the file is sent in. Occasionally, however—

Q. All I wish to know is did you have the file there for your use?

A. I couldn't tell you that right now.

Q. Did you render your opinion at that time no true tuberculosis existed had you known of the pulmonary condition?

A. I said there were no clinical evidence of pulmonary condition—pulmonary tuberculosis.

Q. If you should find, or if in examining these medical records you found he had a previous diagnosis of tuberculosis pulmonary, chronic active, middle and upper, right and left apex when in the hospital in Newport News, Virginia, February 2d, 1919, would you say no true tuberculosis existed?

A. If that was my impression I would, sure, in spite of the fact he probably had a history of tuberculosis. [55]

Q. Did you hear Dr. Feaman's report in 1931 with a diagnosis of tuberculosis pulmonary?

A. Yes, I think he said—

(Testimony of Dr. A. D. Tollefson.)

Q. Moderately advanced, arrested?

A. Yes sir.

Q. Would that be an indication of the existence of tuberculosis?

A. It would indicate the man at some time had had tuberculosis.

Q. Do you concur in this statement of Dr. Feaman's that a man far advanced in tuberculosis can work continuously?

A. If he was active he couldn't, but if not active he may be far advanced and have a complication of some kind that would make it far advanced and still be able to work.

Q. If he does work when it is inactive isn't it likely it will re-activate his tuberculosis—if it is inactive and he works isn't it possible it will cause this tuberculosis to become active again?

A. If you are speaking of far advanced case and he becomes inactive he is fortunate to become inactive. These things do occur frequently. If he then should subject himself to exposure or to the unusual things he would then become active again of course more easily than a man with incipient form or minimal." (R. 145-6-7)

On Re-direct Examination,

Dr. Tollefson testified that the usual and customary expert fee for a doctor testifying, was \$25.00 per day.

(Testimony of Dr. A. D. Tollefson.)

“Re-cross Examination

By Mr. FLUENT:

“Q. If a man would have moderately advanced tuberculosis—if experience shows that with each effort to work it caused a break down would you say that it was injurious for that man to work, or not?

A. Well, of course, if he shows he is having a break down it is certainly injurious for him to work—the question is has the man had a sufficient treatment in the first place.” (R. 147)

At this point defendant offered in evidence certain testimony set up in an affidavit, for the continuance of certain witnesses, as follows:

“That the said Harry Telfer, one of said witnesses, would testify that from the year 1925, and down to the present time he has lived and resided in the vicinity of Elcho, Wisconsin, and that from at least the year 1925 down to the present time he has been personally acquainted with the [56] plaintiff, Thomas Bee Williams and saw the said plaintiff a great many times during the years 1925 to 1927, inclusive; that he had occasion to observe the physical and mental condition of said plaintiff during the years 1925 to 1927, inclusive, and during this entire time the said Telfer observed that the said Williams was not suffering from any phy-

sical or mental condition and had no physical or mental disability in so far as the said Telfer observed, except that during a period of time when the plaintiff, Thomas Bee Williams, was under the influence of alcoholic beverages; that Williams during the years 1925 to 1927 was frequently intoxicated and addicted to the use of alcoholic beverages, and that this physical or mental condition was the only disability which the plaintiff had, according to the observation of the witness Telfer during the period of time that the plaintiff, Thomas Bee Williams, lived and resided in the vicinity of Elcho, Wisconsin, during the years 1925 to 1927, inclusive.

Affiant further states that the said witness, Richard Snyder, will testify that at the present time he is comptroller of the Forest Lumber Company at Elcho, Wisconsin, and that during the years 1925 to 1927, said Snyder lived in Elcho, Wisconsin, and was well and personally acquainted with the plaintiff, Thomas Bee Williams, and had frequent occasions during the years above mentioned to observe the mental and physical condition of the plaintiff, Thomas Bee Williams, and that the said Snyder will testify that he observed no mental or physical disability of the plaintiff during the years aforesaid, except at the times when the said Thomas Bee Williams was under the influence of intoxicating liquors, which was on a great many occasions, and that the plaintiff, Thomas Bee Williams, was addicted to the habitual use of al- [57] coholic beverages.

Affiant further states that the witness, Nick Visser, will testify that he lived and resided in the

vicinity of Elcho, Wisconsin, during the years 1925 to 1927, inclusive, and during the period of time when the plaintiff, Thomas Bee Williams, lived and resided in that vicinity; that the said Visser had occasion to observe at very frequent intervals the mental and physical condition of Thomas Bee Williams during the years 1925 to 1927, inclusive; that the said Visser did not observe any mental or physical disability which the said Williams had during the period of time aforesaid with the exception that during this time the said Williams was frequently intoxicated and addicted to the use of alcoholic beverages.

R. D. LANG,

testified on behalf of defendant, that he was a police officer of Yakima; had been on the police department since 1928; that he had spent some time in the sheriff's office, and that his present occupation was a plain clothes man; that he had known plaintiff since 1928; that he recalled having him under arrest and observed him around the police station and on the streets of Yakima a number of times;

“Q. Where on the streets in Yakima did you see him?

A. Generally down on what we call ‘Skid row’ down around Front Street in that part of town.

Q. Have you seen him a number of times down there? A. Yes.

(Testimony of R. D. Lang.)

Q. What was his mental or physical condition?

A. Generally when I noticed him he would be under the influence of liquor, or partially under the control of liquor." (R. 150-1)

That the first time he saw plaintiff was in 1928, at which time he was acting as jailer of the city hall; that plaintiff was brought in and booked as a drunk.

"Q. How often would you say you have seen him since that time?" [58]

A. I would say somewhere around fifteen or twenty times.

Q. And all of those times was he in the same condition?

A. Either in a very drunken condition or he would be on the streets and had been drinking and more to get him out of sight I would tell him to get out of sight or under cover.

Q. Did you send him home on many occasions?

A. I wouldn't say many, but several." (R. 151)

On Cross Examination

witness testified:

"Q. You only saw him on fifteen or twenty occasions altogether—you testified you saw him on fifteen or twenty occasions.

A. That's all I recall, yes." (R. 152)

That he did not know where plaintiff was in the fall of 1932, but in January, of 1932 he knew plain-

(Testimony of R. D. Lang.)

tiff was in Yakima; that he did not know where plaintiff was living in 1928, 1929, 1930 and 1931; that plaintiff was not in town all the time, but that witness had seen him in Yakima frequently; that the "skid row" referred to was a neighborhood where a low class of individuals and hangers-on congregated.

At the request of the Government, the depositions of Mr. H. W. Hanson and Dr. C. O. Decker were then published.

H. W. HANSON'S TESTIMONY

was as follows:

That he resided in Crandon, Wisconsin, for a period of about 13 years; that he was a druggist by occupation; that he knew the plaintiff; that he had known him about ten years; that he was familiar with the plaintiff's habits as to indulgence in intoxicating liquor and that from his observation plaintiff seemed to be a very heavy drinker and he had seen under the influence of liquor several times.

"Q. Do you know of any physical ailment or disability?

A. Not to my knowledge. No, I never observed any physical disability." (R. 154)

That his physical condition seemed fair, though he wasn't a robust man; that plaintiff's reputation for sobriety [59] in the community wasn't good; that from his own observation, he would say that plaintiff was a drinking man; that he had seen him

(Testimony of C. O. Decker.)

pretty well under the influence of liquor, and seen him laid out flat on his back probably three or four times in a period of about two years.

C. O. DECKER

testified by deposition:

That he resided at Crandon, Wisconsin; age 62; that he was a physician and surgeon, a graduate of the Marquette University at Milwaukee, in 1901; licensed to practice medicine in the State of Wisconsin; that he had been actively engaged in the practice of medicine since 1901, at Crandon, Wisconsin; that he is acquainted with plaintiff, who formerly lived in Crandon; that he had known plaintiff about ten years ago for a period of two years or better, shortly after the war; that he had examined the plaintiff, having been called by some stranger to go to plaintiff's home. [60]

At this point plaintiff objected to the testimony of the doctor on the ground of privilege existing between a doctor and his patient, which objection was sustained and exception allowed to defendant.

The material parts of the deposition of Dr. Dailey was also excluded upon the same ground, to which exclusion the defendant excepted and exception allowed.

Plaintiff was then recalled to the witness stand and cross examined by Mr. Dawson:

(Testimony of Thomas Bee Williams.)

Plaintiff testified as follows: That at the date of his discharge he had filed a claim for compensation. Plaintiff then identified Defendant's Exhibit B as one of the claims made out in 1924, identifying his signature on said claim, in which he had given the name of Dr. C. O. Decker of Crandon, Wisconsin, as a reference.

The deposition of Dr. Decker was again offered and the same ruling made by the Court.

In order to put the matter fairly in the record, the depositions of Dr. Dailey and Dr. Decker offered in evidence the Court's ruling:

"I will sustain the objection on the ground they contain privileged communications or contain evidence of a privileged character."

That portion of

DR. DAILEY'S DEPOSITION

pertaining to his name, qualifications and place of residence was read into the record and that portion of the deposition dealing with the witness's general knowledge of plaintiff's reputation for truth and veracity was admitted in evidence, the testimony being as follows:

Q. Doctor, do you know whether the plaintiff has a reputation as to his veracity in the community in and about [61] Elcho?

A. Yes, he has.

Q. What is that reputation?

A. He is a very unreliable man and has a poor reputation for veracity.

The Government's case was then closed, at which time defendant made the following motion:

“The Government renews its motion for an order of non-suit, or, in the alternative, for a directed verdict in favor of the defendant, upon the grounds and for the reason that plaintiff has failed to establish by a preponderance of the evidence, or by any competent evidence that the plaintiff in this case was permanently and totally disabled from following a gainful occupation within the meaning of the war risk insurance act.”

The motion was denied and exception allowed, at which time plaintiff joined with defendant's motion for a directed verdict in his favor.



Whereupon the Court dismissed the jury and returned his verdict in favor of the plaintiff, finding that the plaintiff had been totally and permanently disabled as early as February 2, 1919, to which ruling defendant objected and objection allowed.

[62]



CERTIFICATE OF JUDGE TO
BILL OF EXCEPTIONS.

United States of America,
Eastern District of Washington.—ss.

I, J. STANLEY WEBSTER, United States District Judge for the Eastern District of Washington, and the Judge before whom the above entitled action

was tried, to-wit, the cause entitled Thomas Bee Williams, Plaintiff, vs. United States of America, Defendant, No. L-1709, in said District Court,

DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of the said Court and thereafter duly and regularly served within the time authorized by law; and that amendments were proposed to said bill of exceptions and same have been allowed and are embodied therein; that due and regular written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time (not less than three days nor more than ten days after the service of said notice) to settle and certify said bill of exceptions.

Dated this 8th day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

[Endorsed]: Lodged Feb. 9, 1934.

[Endorsed]: Filed Mar. 8, 1934. [63]

[Title of Court and Cause.]

STIPULATION AND ORDER.

IT IS STIPULATED AND AGREED between Russell H. Fluent, attorney for plaintiff, and Roy C. Fox, United States Attorney for the Eastern District of Washington, that all of the original exhibits, introduced in evidence by either plaintiff or defendant at the trial of the above entitled cause, may be forwarded to the Clerk of the Circuit Court for the Ninth Circuit, for inspection by said Court in considering the appeal in the above entitled cause.

RUSSELL H. FLUENT,

Attorney for Plaintiff.

ROY C. FOX,

Attorney for Defendant.

Upon stipulation of counsel, it is ORDERED that all of the original exhibits introduced by either plaintiff or defendant at the trial of the above entitled action, be forwarded by the Clerk of the above entitled Court to the Clerk of the Circuit Court for the Ninth Circuit, and that the same be returned to the Clerk of this Court after the disposition of said cause on appeal.

Dated this 10th day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

[Endorsed]: Filed Mar. 10, 1934. [64]

[Title of Court and Cause.]

CITATION ON APPEAL.

To THOMAS BEE WILLIAMS, and to RUSSELL H. FLUENT, your attorney:

You are hereby notified that in the above entitled court and cause an appeal has been allowed the defendant, the United States of America, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California within thirty days from the date of this citation, to show cause, if any there be, why the judgment in said cause should not be reversed.

WITNESS the HONORABLE J. STANLEY WEBSTER, United States District Judge, this 8 day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

Attest: A. A. LaFRAMBOISE,
Clerk.

Copy of above citation received this 9th day of March, 1934.

RUSSELL H. FLUENT,

Attorney for Plaintiff. [65]

[Title of Court and Cause.]

PRAECIPE ON APPEAL.

To the Clerk of the United States District Court
for the Eastern District of Washington:

Please prepare and certify to the United States
Circuit Court of Appeals, Ninth Circuit, the fol-
lowing records, pleadings, files and papers in the
above entitled action:

Complaint

Answer

Verdict

Amended judgment

Petition and order allowing appeal

Assignments of error

Order extending time for filing bill of exceptions

Bill of exceptions

Citation on appeal

Praecipe on appeal

All original exhibits

Stipulation and order to forward original ex-
hibits to Clerk of Circuit Court.

ROY C. FOX

United States Attorney.

[Endorsed]: Filed Mar. 10, 1934. [66]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages numbered 1 to 66 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Yakima in said District this 14th day of March, A. D. 1934.

[Seal]

A. A. LaFRAMBOISE, Clerk,
By Margaret E. Bailey, Deputy. [67]

[Endorsed]: No. 7431. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Thomas Bee Williams, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed March 17, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals

NINTH CIRCUIT 7

UNITED STATES OF AMERICA,

Appellant,

vs.

THOMAS BEE WILLIAMS,

Appellee.

*Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division.*

HONORABLE J. STANLEY WEBSTER, *Judge.*

BRIEF FOR THE APPELLANT.

JAMES M. SIMPSON,
United States Attorney.

WILL G. BEARDSLEE,
Director, Bureau of
War Risk Litigation.

WILBUR C. PICKETT,
Special Assistant to
the Attorney General.

FILED

AUG 11 1934

PAUL P. O'BRIEN,

CLERK

IN THE
United States
Circuit Court of Appeals

No. 7431

UNITED STATES OF AMERICA,

Appellant,

vs.

THOMAS BEE WILLIAMS,

Appellee.

*Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division.*

HONORABLE J. STANLEY WEBSTER, *Judge.*

BRIEF FOR THE APPELLANT.

JAMES M. SIMPSON,
United States Attorney.

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STATEMENT.

Thomas Bee Williams, appellee, hereinafter called plaintiff, brought suit against the United States, appellant, hereinafter called defendant, on a contract of war risk insurance. The complaint (R. 2-5) filed July 22, 1932, alleged the maturity on May 28, 1919, of a contract of insurance in the sum of \$10,000 by total permanent disability as a result of pulmonary tuberculosis, chronic bronchitis, myocarditis, nervousness and neurasthenia.

The answer (R. 5-7) joined issue on the allegation of total permanent disability.

The case was tried before the Court with a jury. Plaintiff testified in his own behalf and called four lay witnesses, none of whom except his father, was shown to have known plaintiff prior to 1924, and four medical witnesses who testified as experts, none of whom examined plaintiff prior to 1930, or 1931 (R. 35, 46, 51, 55). Defendant called two medical witnesses who had examined the plaintiff in 1924 (R. 65) and in 1931 (R. 61) respectively and offered the depositions of two physicians, one of whom had known plaintiff about "ten years ago for a period of two years" (R. 73). The depositions of defendant's medical witnesses were excluded on the ground of privilege (R. 73).

The exhibits of plaintiff and defendant show that

plaintiff was treated in service for bronchitis and suspected tuberculosis. A diagnosis of active tuberculosis was shown by the exhibits to have been made shortly after plaintiff's discharge from service. Despite conduct not conducive to cure of the disease, the tuberculosis is shown to have become arrested, and to have so remained for a considerable period of time although later reactivated. The record shows that plaintiff was discharged from a Government hospital at Whipple Barracks, Arizona, for disciplinary reasons (R. 26), that he has been absent from Government hospitals without leave on other occasions (R. 26), that in one city in which he had spent considerable time he had been arrested for drunkenness "approximately twenty times" (R. 28), and the record is replete with evidence of plaintiff's drinking (R. 28, 71, 72, 21, 25, 27, 33, 34, 69, 70). A detailed resume of the evidence is set out hereinafter at pp. 6 to 18.

The case was tried in October, 1933, prior to the affirmance by the Supreme Court of *Falbo v. United States*, 291 U. S. 646, reported fully in 64 F. (2d) 948 (C.C.A. 9th).

At the close of all the evidence defendant moved for a directed verdict, in which plaintiff joined, and to the denial of said motion noted an exception (R. 75). Judgment in favor of the plaintiff, finding him totally permanently disabled from February 2,

1919, and awarding to him \$57.50 per month from that date to October 2, 1933, was entered as amended December 15, 1933. Defendant's petition for appeal (R. 12) and assignment of errors (R. 13-15) were duly filed and the appeal allowed (R. 12).

QUESTIONS PRESENTED.

1. Whether there is any substantial evidence that plaintiff became totally disabled on February 2, 1919.

2. Whether the Court erred in the admission over defendant's objection and exception of testimony by witnesses qualified only as physicians, that plaintiff was totally permanently disabled.

PERTINENT STATUTES AND REGULATIONS.

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or permanent and total disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

“shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regula-

tions not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes.”

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

“Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed. * * * to be total disability.

“Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *”

ASSIGNMENT OF ERRORS.

(R. 13-14)

I.

The Court erred in denying defendant's motion at the close of plaintiff's case, for a verdict in defendant's favor, or, in the alternative, for a nonsuit, on the ground and for the reason that the evidence adduced by and on behalf of plaintiff did not establish a prima facie case, and was insufficient to support a verdict, and on the further ground that there was no proof of any permanent and total disability occurring while the contract of insurance was kept in force and effect by the payment of the stipu-

lated monthly premium thereon, and on the further ground that the evidence affirmatively showed that plaintiff was not permanently or totally disabled, to which denial the defendant took exception at the time of the interposition of said motion herein.

II.

The Court erred in denying defendant's motion, at the close of all the evidence, for a directed verdict, upon the grounds and for the reason that the evidence adduced did not prove plaintiff to be permanently and totally disabled from following a gainful occupation during the time that his policy was in force and effect; and upon the further ground that the evidence affirmatively showed that the plaintiff was not permanently and totally disabled during the period that the policy sued upon was in force and effect, to which denial the defendant took exception.

III.

The Court erred in excluding from the evidence the depositions of Dr. C. O. Decker and Dr. Paul J. Dailey, which depositions were offered on behalf of defendant, to which ruling defendant excepted and exception was allowed.

IV.

The Court erred in denying the objection of de-

fendant to the testimony of experts as to the ultimate facts, to which ruling defendant excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of the plaintiff herein, as the evidence was insufficient to sustain a judgment.

RESUME OF THE EVIDENCE.

Before service plaintiff was a laborer following kitchen work considerably. He testified that he worked steadily before service. He had a sixth grade education. After service on the Mexican border he was mustered into Federal service and in November, 1917, was granted a policy of war risk insurance (R. 16). At the front in France he waded in mud often without change of clothing, was under fire and was rendered nervous by the near explosion of a shell. He testified that he contracted a severe cough, ran a fever, began to lose weight, was sent to a hospital and remained in the hospital and a convalescent camp for several months. He testified that he continued to lose weight, had a poor appetite, vomited, had pains in his chest, ran a fever, became nervous and coughed constantly (R. 18). He returned to the United States February 2, 1919. He was sick on the boat and spent thirty days in a camp hospital. He testified he was in a tuberculosis ward

in another hospital for a time not stated. He was discharged May 28, 1919. He worked for a construction company for eight days and a cafe for a week or ten days and left each job because of illness. He was examined and sent to a tuberculosis sanitarium in Portland (R. 18) for forty days. In January, 1920, he was sent to a hospital in Palo Alto, California, and transferred to a hospital at Whipple Barracks, Arizona, spending two months in each. He was discharged from the latter hospital and worked on a public highway for fifteen days (R. 19). He left this employment and another job with a lumber company after thirty days because of sickness and inability to work. In 1921, he was in two government hospitals for a few days each time. For a year he did nothing. He had married in 1920 (R. 27) and in December, 1923, moved his family from Wisconsin to Yakima, Washington. He worked for a lumber company for two weeks but quit because of his condition (R. 20). He drank liquor at that time but testified that it had nothing to do with his sickness or loss of employment. He was in a government hospital several times in 1924 and 1925, and testified that a diagnosis of active tuberculosis was made by the hospital in 1924 (R. 21). He testified that he worked at several jobs for short periods and quit each of them because of his condition. He spent a few days in a Soldiers' Hospital and was transferred to the Soldiers' Home

(R. 22). He testified that he worked for brief intervals at various jobs until 1931 and quit each of them because of his condition (R. 23-24). Since 1931, he has worked twice for brief periods (R. 24). He testified that he had been treated by several physicians (R. 24) and that he has been in numerous government hospitals for brief intervals (R. 23).

He testified that he is still losing weight, has night sweats, coughs, raising mucous and often blood, has pains in chest and fever, is nervous and sleeps hardly at all, that his heart bothers him. His present weight of 145 pounds is four and one-half pounds under his weight at enlistment in service, although in the army he reached a weight of 167 or 170 pounds (R. 24).

He testified that he drinks occasionally and has done so since 1920; that he has nervous convulsions whether he drinks or not (R. 25).

On cross examination plaintiff testified in reference to hospitalization at Whipple Barracks, Arizona in 1919:

Q. You had some trouble down there and you were discharged for being drunk, weren't you?

A. That was the charge, yes. (R. 26).

He testified that he became absent without leave

from a Government hospital in Tennessee in 1921, from the government hospital in Walla Walla in 1924 (R. 26) and again in 1925 (R. 27); that he had been in jail for drunkenness at different times and had been arrested for drunkenness at Yakima approximately twenty times (R 28).

He testified that he had claimed and received an allowance for wages lost in reporting to Government institutions for physical examination; that he was placed in vocational training in 1922 or 1923 and "quit of his own accord" after seventeen or eighteen days (R. 28).

Plaintiff's Exhibit 2, which was admitted in evidence, which is a report of a physical examination made by Dr. Pierce, discloses a diagnosis of deep peribronchial tuberculosis with loss of strength and neurasthenia, giving the prognosis, however, as good. The service records or records known as the Adjutant General's office file, plaintiff's Exhibit No. 1, discloses that the assured had bronchitis, heart trouble and a venereal disease prior to his muster into the Federal service and before the issuance of his war risk insurance contract, which is the basis of the present suit. It likewise discloses that he had since childhood a number of diseases and had always been in a rather sickly and weakened condition, all of which was shown to exist before his induction into the Federal service.

Elmer Day testified that plaintiff worked for him for eight or ten days in 1924 or 1925; that plaintiff appeared weak, coughed a little and quit work; that he saw plaintiff in bed the next day when he had a slight hemorrhage and spat blood in a waste paper basket (R. 30).

Fred Jackson testified that he operated an orchard; that plaintiff worked for him in 1924 and 1931; that plaintiff complained of his lungs and witness had seen him spit blood; that plaintiff would do his share of work for three days or a week and quit; that he imagined had plaintiff stayed with him there would have been available three years of work between 1924 and 1931 (R. 32-33).

Plaintiff's father testified that plaintiff did not look well just before discharge from service; that he had seen plaintiff often since he moved to Yakima (December, 1923—R. 20); that plaintiff drank some; was nervous and would go into convulsions; that plaintiff would work a little and have to lay off; that he was unable to stand anything (R. 34).

Dr. Duncan testified that he had examined plaintiff "two or three weeks prior to the trial" and once "two or three years prior to the trial". He examined plaintiff for the purposes of the trial, took a history from plaintiff and took the history into account in making his diagnosis (R. 35).

In the opinion of the witness “plaintiff was suffering from a chronic tubercular condition; that it was in an advanced stage, but not active at the present time; that he prescribed that the plaintiff should not work at hard labor or expose himself and should live a quiet, easy life; that rest is essential at all times in the treatment of tuberculosis; that labor would aggravate his condition; that, in his opinion, the man should never engage in hard labor; that he couldn’t engage in work of any kind continuously.” (R. 36).

In response to a hypothetical question (R. 36-40) from which was omitted any reference to plaintiff’s neglect of his condition as shown by his own testimony of absences without leave from Government hospitals, drunkenness and arrests for drunkenness, the witness was permitted to testify over defendant’s specific objection, to an opinion that plaintiff was “totally and permanently disabled from the date of his separation from the service” (R. 40).

The witness believed—

that a case of incipient tuberculosis could be absolutely cured, but that in the case of plaintiff, he believed that a permanent arrest was not possible, and that while plaintiff’s tuberculosis might be arrested for a time, it would break down with fatigue and become active and be so throughout the man’s life. (R. 40-41).

The witness thought tuberculosis could be ar-

rested but not absolutely cured; that when “an arrested case of tuberculosis flared up, that the patient was out of luck” (R. 42); that arrested tuberculosis acts as a vaccination against subsequent attacks “to a great extent” perhaps accounting for some degree of immunity in the white race (R. 43); that “the effect of heavy drinking on a tubercular patient would be adverse; but that a moderate use of alcohol would be beneficial; that he could not remember the date of his first examination; that he kept no office notes and that the only treatment he recommended was that plaintiff take life easy” (R. 44).

Dr. J. L. McDonald examined plaintiff October 5, 1933, diagnosed “tuberculosis, moderately advanced in both lungs” for which he prescribed dry climate, mental and physical rest. For plaintiff to engage continuously in any kind of work would be injurious to his health and that his condition was reasonably certain to last throughout his lifetime. In response to the same hypothetical question asked Dr. Duncan (R. 36-40) the witness was permitted to testify, over the same objection previously interposed by defendant, to an opinion that plaintiff was “totally and permanently disabled at the date of his separation from the service on May 28, 1919.” (R. 47).

On cross examination the witness testified that he had—

appeared as a witness in a number of war risk

insurance cases; that the fee he was to receive for his testimony was contingent upon plaintiff winning the case and that he would not come into court for less than a fee of \$250. (R. 47).

In response to a question of the Court the witness reported his findings as to plaintiff's condition as "moderately advanced tuberculosis, possibly active." (R. 49).

Dr. Storgaard examined plaintiff first in 1931, and treated him for pleurisy. He had examined plaintiff several times since, making a diagnosis of "chronic, moderately advanced, pulmonary tuberculosis, pleurisy and cardiac hypertrophy" (R. 51). He considered plaintiff unable to engage in any kind of labor continuously and the disability reasonably certain to last throughout life. In response to the same hypothetical question asked Dr. Duncan (R. 36-40) the witness was permitted to testify over defendant's objections to an opinion that plaintiff was "totally and permanently disabled at the date of his discharge from the United States Army May 28, 1919" (R. 52).

On cross examination the witness testified that he was "charging the plaintiff for his testimony whatever the plaintiff chose to pay; that he found the plaintiff's tuberculosis in 1931 active; that he had no record of his examinations; that his files and records had been lost and he was testifying from memory absolutely" (R. 53).

Dr. Tracy testified that he first examined plaintiff in August, 1931, and examined him again a few days before the trial; that he made a complete mental and nervous examination and concluded that plaintiff "was suffering from asthenia which means a general weakening of the greater muscular physical system" (R. 55); that asthenia is a nervous condition associated with neurasthenia which is a permanent condition; that "even without tuberculosis plaintiff would not be able to work" (R. 56). The witness was asked the same hypothetical question asked Dr. Duncan (R. 36-40) and over the same objections was permitted to testify to an opinion that plaintiff was "totally and permanently disabled at the date of his separation from the service May 28, 1919" (R. 57).

On cross examination the witness testified that he had—

testified as an expert witness in a large number of war risk insurance cases; maybe 15 or 20; that he had made no particular arrangements about his fee for testifying in this case; that he did have an understanding that he would be paid a reasonable fee for his services and that his fee in the case was to be contingent upon the winning of the suit (R. 57);

that he "would expect at least \$300.00 as a fee"; that at the present time he was practicing in Seattle "but I haven't had an office in Seattle for a period of about two years * * * I have been taking

care of regular cases, and acting as expert witness” (R. 58).

The witness further testified—

that the long continued use of alcohol might affect plaintiff’s stomach and might affect him mentally, but that it didn’t have an adverse affect on a man’s nervous system; that undoubtedly one of the best treatments for a neurasthenic patient was to give him a drink occasionally. * * * that ordinarily a nervous person required but little liquor to become intoxicated, but that in his opinion nothing that plaintiff could have done would have changed his condition of total and permanent disability after he was discharged from the army. (R. 59-60).

Defendant called Dr. Feaman who had examined plaintiff August 11, 1931, and found “pulmonary tuberculosis, chronic, moderately advanced, healed, with chronic bronchitis, moderate * * * no evidence of active tuberculosis” (R. 61-62). The witness thought that there were “many occupations (plaintiff) could follow and which would very much improve his mental attitude” (R. 63).

On cross examination the witness testified that excessive use of liquor would have a bad effect on any chronic disability; that work would reactivate tuberculosis but that a person with arrested tuberculosis could engage in light labor, could drive a taxicab in Seattle; that chronic neurasthenia might be

detrimental to one suffering from tuberculosis. (R. 64).

Defendant's witness, Dr. Tollefson, examined plaintiff in February, 1924, making a chest examination only and finding nothing to indicate the presence of tuberculosis (R. 65); "There was no clinical evidence of pulmonary condition—pulmonary tuberculosis" (R. 66). The witness testified that a man with active tuberculosis could not work but that "if not active he may be far advanced * * * and still be able to work" (R. 67).

Harry Telfer saw plaintiff a great many times during the years 1925 to 1927; that "the said Williams * * * had no physical or mental disability in so far as the said Telfer observed, except that * * * when * * * Williams was under the influence of alcoholic beverages; that Williams during * * * 1925 to 1927 was frequently intoxicated" (R. 68-69).

"Richard Snyder * * * comptroller of the Forest Lumber Company at Elcho, Wisconsin * * * during * * * 1925 to 1927 * * * was well * * * acquainted with the plaintiff, Thomas Bee Williams * * * and * * * observed no mental or physical disability of the plaintiff * * * except * * * when * * * Williams was under the influence of intoxicating liquors, which was on

a great many occasions.” To the same effect were the observations of Nick Visser (R. 69-70).

R. D. Lang, police officer of Yakima, testified that he had known plaintiff since 1928; recalled having arrested him and had observed him on the streets. The witness testified:

“Generally when I noticed him he would be under the influence of liquor, or partially under the control of liquor” (R. 71).

H. W. Hanson testified by deposition that he had known plaintiff about ten years; that “from his observation plaintiff seemed to be a very heavy drinker and he had seen him under the influence of liquor several times”; that “I never observed any physical disability”; and that “plaintiff’s reputation for sobriety in the community wasn’t good” (R. 72).

The deposition of Dr. C. O. Decker who had “known plaintiff about ten years ago for a period of two years or better, shortly after the war” and who had “examined the plaintiff” was excluded on plaintiff’s objection “on the ground of privilege existing between a doctor and his patient” (R. 73), and the material parts of the deposition of Dr. Dailey were excluded upon the same ground (R. 74), although there was admitted the testimony of Dr. Dailey that plaintiff is “a very unreliable man and has a poor reputation for veracity”. (R. 74.)

With the exhibits the foregoing constitutes the substance of all the evidence adduced at the trial.

In connection with the assured's voluntary relinquishment of the training facilities afforded him by the Government, and in connection likewise with his failure to prove an effort or lack of ability to fit himself for a more remunerative position requiring less manual labor than that to which he was ordinarily accustomed, the attention of this Court is directed to the case of *Proechel v. United States*, 59 Fed. (2), 648, in which it was held that the burden rested upon the plaintiff of showing a lack of physical or mental capacity to acquire such training as would fit him for some lucrative employment.

In the *Proechel* case the Court of Appeals for the Eighth Circuit stated as follows, in its opinion:

By way of illustration, let us suppose two youths entered the military service. They were mentally equally endowed, had only a grade school education, and with no experience except as farm hands. Each contracted a disease that resulted in the permanent ankylosis of the joints of his ankles so that no longer could he do a farmer's work. Opportunity for training for other work was offered them. One grasped that opportunity and made of himself a lawyer. The other rejected the opportunity, perhaps (as within common knowledge many times has happened) fearing he would overcome his handicap and so lose the privilege he prizes of living without toil. The first wished to and did

overcome the handicap of ankylosis. The second cherished and preserved it as capital from which through life he might draw dividends. Both had contracts of war risk insurance. The first certainly cannot prove that by reason of his handicap it is now impossible for him continuously to carry on a substantially gainful employment. All the second could prove is that, by reason of his handicap and his refusal to overcome it, it is now impossible for him to earn a living by his own efforts in any trade or occupation. The second can no more make out a case than could the first.

When the reliance of an insured is on a disease of the body of such a nature as that it does not necessarily disqualify him permanently for all occupations whatever, it is competent for him to prove his lack of experience, schooling, and training as having relevancy to his ability to carry on any substantial gainful occupation, but he has the burden also of showing either lack of mental capacity or of opportunity or of both to acquire such training as would fit him for some reasonably remunerative employment.

POINTS AND AUTHORITIES

I.

THERE IS NO SUBSTANTIAL EVIDENCE OF THE PERMANENCE ON FEBRUARY 2, 1919, OF ANY TOTAL DISABILITY THEN EXISTING.

Falbo v. United States, 64 F. (2d), 948 (C. C. A. 9th).

Affirmed, 291 U. S. 646.

United States v. Lumbra, 63 F. (2d), 796
(C. C. A. 2nd).

Affirmed, 290 U. S. 551.

United States v. Rentfrow, 60 F. (2d), 488
(C. C. A. 10th).

II.

THE COURT ERRED IN THE ADMISSION OF TESTIMONY BY WITNESSES QUALIFIED ONLY AS PHYSICIANS THAT PLAINTIFF WAS TOTALLY PERMANENTLY DISABLED.

United States v. Sauls, 65 F. (2d), 886 (C. C. A. 4th);

Prevette v. United States, 68 F. (2d), 112
(C. C. A. 4th);

Miller v. United States, decided June 8, 1934 (C. C. A. 5th);

United States v. Matory, decided June 21, 1934 (C. C. A. 7th);

Harris v. United States, 70 F. (2d), 889
(C. C. A. 4th).

ARGUMENT

THERE IS NO SUBSTANTIAL EVIDENCE OF THE PERMANENCE OF TOTAL DISABILITY.

The affirmance by the Supreme Court in a per

curiam opinion (291 U. S. 646) in *Falbo v. United States*, 64 F. (2d), 948 (C. C. A. 9th) definitely established the requirement in war risk insurance cases of substantial evidence of total disability occurring during the life of the contract and then reasonably certain to be permanent during lifetime. *United States v. McCreary*, 61 F. (2d), 804 (C. C. A. 9th).

Plaintiff's case is legally deficient for the want of any substantial evidence of the permanence of total disability, a burden "not carried by leaving the matter in the realm of speculation". *United States v. Rentfrow*, 60 Fed. (2d), 488 (C. C. A. 10th).

Plaintiff introduced no factual medical testimony concerning his physical condition prior to 1930, or 1931 (R. 35, 46, 51, 55) and successfully excluded, on the ground of privilege, the depositions of two physicians, at least one of whom had "known plaintiff about ten years ago for a period of two years" (R. 73). The strongest evidence in support of the plaintiff's claim is the record in service of chronic bronchitis and suspected incipient pulmonary tuberculosis (Plaintiff's Exhibit 1) and the diagnosis of activity of tuberculosis within a short time after discharge (Plaintiff's Exhibit 2).

The authorities have recognized incipient tuberculosis as a condition requiring rest and treatment and, therefore, totally disabling (*Nicolay v. United*

States, 51 F. (2d), 170 (C. C. A. 10th); *Eggen v. United States*, 58 F. (2d), 616 (C. C. A. 8th); *United States v. Stack*, 62 F. (2d), 1056 (C. C. A. 4th), but with equal uniformity of decision have held such condition does not of itself mature a contract of insurance against total disability “reasonably certain * * * (to) continue throughout the life of the person suffering from it.” (Treasury Decision No. 20, *supra*.)

In the case of *United States v. Messinger*, 68 F. (2d), 234 (C. C. A. 4th) it was said by Judge Parker (p. 237):

“To say that a man who has an arrested case of tuberculosis, or a case which can be arrested with proper treatment, is totally and permanently disabled, because he cannot do heavy labor or work amid all conditions, is to adopt a theory contrary to human experience and one which has been repudiated by the courts in a practically unbroken line of decisions. See particularly *Ivey v. United States* (C. C. A. 4th) 67 F. (2d) 204; *United States v. Diehl*, *supra*; *United States v. Rosborough* (C. C. A. 4th) 62 F. (2d) 348; *United States v. Stack*, *supra*; *Eggen v. United States* (C. C. A. 8th) 58 F. (2d) 616, 620.”

A further list of cases denying recovery on a contract of war risk insurance for merely incipient tuberculosis is set out in the footnote below.*

**Nicolay v. United States*, 51 F. (2d) 170, 173 (C.C.A. 10th); *Hirt v. United States* 56 F. (2d) 80, 82 (C.C.A. 10th); *Roberts v. United States*, 57 F. (2d) 514, 515 (C.C.A. 10th); *Eggen v. United States*, 58 F. (2d)

In many respects the instant case is analogous to *United States v. Rentfrow*, *supra*, cited with approval by this Court in *Falbo v. United States*, 64 F. (2d), 948 (C. C. A. 9th), in which it is said (p. 489):

“There is evidence sufficient to support the trial court’s finding that the insured was suffering from pulmonary tuberculosis when he was discharged from the Army. There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject is that of Dr. Calhoun, who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment suggested. It is suggested by appellees that liability exists unless the evidence affirmatively discloses that the condition was not a permanent one. We are cited to *Humble v. United States*, 49 F. (2d) 600, 601, where the District Court allowed a recovery because it was ‘impossible to say that the disease would

616, 618-619 (C.C.A. 8th); *United States v. Rentfrow*, 60 F. (2d) 488, 489 (C.C.A. 10th; *Garrison v. United States*, 62 F. (2d) 41, 42 (C.C.A. 4th); *United States v. Diehl*, 62 F. (2d) 343 (C.C.A. 4th); *United States v. Rosborough*, 62 F. (2d) 348 (C.C.A. 4th); *United States v. Peters*, 62 F. (2d) 977, 980 (C.C.A. 8th); *United States v. Stack*, 62 F. (2d) 1056 (C.C.A. 4th); *United States v. Thompson*, 63 F. (2d) 111 (C.C.A. 4th), certiorari denied, 289 U. S. 758; *Andrews v. United States*, 63 F. (2d) 184 (C.C.A. 8th); *Walters v. United States*, 63 F. (2d) 299, 301 (C.C.A. 5th); *Mason v. United States*, 63 F. (2d) 791, 793 (C.C.A. 2nd); *United States v. Hodson*, 64 F. (2d) 119 (C.C.A. 8th); *McCleary v. United States*, 64 F. (2d) 1016 (C.C.A. 9th), certiorari denied 1-15-34; *United States v. Harrell*, 66 F. (2d) 231, 233 (C.C.A. 10th); *United States v. Younger*, 67 F. (2d) 149 (C.C.A. 4th); *Ivey v. United States*, 67 F. (2d) 204 (C.C.A. 4th); *Denning v. United States*, 68 F. (2d) 23 (C.C.A. 2d); *Prevette v. United States*, 68 F. (2d) 112 (C.C.A. 4); *United States v. Gwin*, 68 F. (2d) 124 (C.C.A. 6th); *United States v. Messinger*, 68 F. (2d) 234 (C.C.A. 4th); *Huffman v. United States*, 70 F. (2d) 266 (C.C.A. 4th); *United States v. Lancaster*, 70 F. (2d) 515 (C.C.A. 4th); *Puckett v. United States*, 70 F. (2d) 895 (C.C.A. 5th); *United States v. McShane*, decided May 9, 1934 (C.C.A. 10th).

not continue active for the rest of his life.' But the burden of proof is upon the plaintiff to prove that the disability was permanent, that is, 'founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.' This burden is not carried by leaving the matter in the realm of speculation. * * *

"Such cases as these, which are as frequent as they are unfortunate, make a strong appeal to the sympathies. An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances which may influence that conduct. We can find no support, in this record, for a finding that the tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed in August, 1919. For that reason, the motion of the government should have been sustained. For a strikingly similar case, see *Eggen v. United States* (C. C. A. 8) 58 F. (2d) 616."

The record does not show that plaintiff has made any real effort to effect a cure of his condition, unless the discontinuance of many jobs of intermittent character because "too sick to work, hours too

long” (R. 26) or “on account of weakened condition” (R. 23) and abandonment of vocational training “of his own accord” after seventeen or eighteen days (R. 28) may be so considered, and neglect of his condition is shown by his testimony that he was AWOL (absent without leave) from Government hospitals (R. 26); that he was dismissed from a Government hospital for drunkenness (R. 27); and from another on a charge of drunkenness (R. 26); that he was arrested for drunkenness at Yakima “approximately twenty times” (R. 28). The record is replete with testimony of plaintiff’s drinking (R. 28, 71, 72, 21, 25, 27, 33, 34, 69, 70).

In *Eggen v. United States*, 58 F. (2d) 616 (C. C. A. 8th), it is said (p. 620):

“* * * an insured may not convert a total temporary disability existing before lapse into a total permanent disability by neglecting his condition after lapse, and the failure to take treatment may destroy whatever probative value death or permanency of disability occurring after lapse would otherwise have.”

And to the same effect are *United States v. Galloway*, 62 F. (2d) 1057 (C. C. A. 4th); *Walters v. United States*, 63 F. (2d) 299 (C. C. A. 5th); *United States v. Ivey*, 64 F. (2d) 653 (C. C. A. 10th); *United States v. Rentfrow*, 60 F. (2d) 488 (C. C. A. 10th); *United States v. McCaulley*, 68 F. (2d) 370

(C. C. A. 7th); *United States v. Hill*, 62 F. (2d) 1022 (C. C. A. 8th).

The long and unexplained delay in the assertion of claim (R. 4-5) is strong evidence that plaintiff was not totally permanently disabled during the life of the insurance contract (*Lumbra v. United States*, 290 U. S. 551) and plaintiff's reliance upon the testimony of physicians who did not examine him prior to the year 1930 (R. 35, 46, 51, 55) illustrates the speculative character of his evidence. Excluding as privileged factual medical testimony relating to earlier years, plaintiff relied upon physicians employed on a contingent fee basis (R. 47, 58) who had testified in many like cases (R. 47, 57). The years between February 2, 1919 and 1930 are inadequately bridged, for although alleging total permanent disability more than fourteen years prior to the trial, plaintiff not only failed to call available medical witnesses familiar with his condition in the years before 1930 (Cf. *United States v. Blackburn*, 33 F. (2d) 564 (C. C. A. 9th) who might have supported any just claim, but endeavored successfully to exclude the testimony of such witnesses. His evidence is speculative. (Cf. *United States v. Kerr*, 61 F. (2d) 800 (C. C. A. 9th); *United States v. Koskey*, decided June 11, 1934 (C. C. A. 9th); *United States v. Hill*, 62 F. (2d) 1022 (C. C. A. 8th) and plaintiff has wholly failed to meet the requirement of substantial evidence of permanence. *Falbo*

v. United States, 64 F. (2d) 948 (C. C. A. 9th) affirmed, 291 U. S. 646; *United States v. Rentfrow*, 60 F. (2d) 488 (C. C. A. 10th); *Eggen v. United States*, 58 F. (2d) 616 (C. C. A. 8th).

II.

THE COURT ERRED IN THE ADMISSION OF
TESTIMONY BY WITNESSES QUALIFIED
ONLY AS PHYSICIANS THAT PLAIN-
TIF WAS TOTALLY PERMA-
NENTLY DISABLED.

Plaintiff's medical witnesses should not have been permitted to invade the province of the jury and express opinions concerning the ultimate question to be determined by the trial. *Prevette v. United States*, 68 F. (2d) 112 (C.C.A. 4th); *Miller v. United States*, decided June 8, 1934 (C.C.A. 5th); *United States v. Matory*, decided June 21, 1934 (C.C.A. 7th); *Harris v. United States*, 70 F. (2d) 889 (C.C.A. 4th).

The reasons for the exclusion of such testimony are stated by the Fourth Circuit in a per curiam opinion (*United States v. Sauls*, 65 F. (2d) 886, 887) as follows:

The witness was asked the question: "I ask you Mr. Iseley, from your observation of him, whether or not, in your opinion, since you first

knew him, in 1923, up to now, he has been able to engage continuously in any gainful occupation?" And he answered: "No, sir, his physical condition was such he could not."

We think that this question and answer were clearly objectionable, in that they invaded the province of the jury, and that this objection is valid irrespective of whether the witness be a lay witness or an expert. The ultimate question on the totality of disability was whether plaintiff was able to follow continuously a substantially gainful occupation. What is meant by continuously in the regulations construing a war risk policy is a question of law. See *Carter v. U. S.* (C. C. A. 4th) 49 F. (2d) 221. The same is true as to what is to be deemed a gainful occupation under these regulations. The question permitted the witness to settle these questions of law for himself, and, applying this law to the facts within his knowledge, to try the very question which the jury had been impaneled to try. This should not be permitted. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 36 S. Ct. 668, 60 L. Ed. 1037; *National Cash Register Co. v. Leland* (C. C. A. 1) 94 F. 502; *Safety Car Heating & Lighting Co. v. Gould Coupler Co.* (C. C. A. 2) 239 F. 861, 865; *Castner Electrolytic Alkali Co. v. Davies* (C. C. A. 2) 154 F. 938, 942; *Standard Fire Extinguisher Company v. Heltman* (C. C. A. 6) 194 F. 400, 401; *Smith v. Board of Commissioners of Lexington*, 176 N. C. 477, 97 S. E. 378; *Ker-*

ner v. Southern Ry. Co., 170 N. C. 94, 97, 86 S. E. 998; *Deppe v. Atlantic Coast Line R. Co.*, 154 N. C. 523, 524, 70 S. E. 622; *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578; *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432; 22 *Corpus Juris*, 502, and cases there cited.

The further objection to such testimony was promptly made (R. 40) that the hypothetical question upon which it was based did not fairly set out the matters in evidence. The hypothetical question wholly ignored the plaintiff's neglect of medical treatment (R. 26) and conduct inimical to cure (R. 26, 27) established by plaintiff's own testimony although the Courts have clearly stated that consideration must be given to such factors in determining the essential element of permanence. *Eggen v. United States*, 58 F. (2d) 616 (C. C. A. 8th); *United States v. Rentfrow*, 60 F. (2d) 488 (C. C. A. 10th); *United States v. Galloway*, 62 F. (2d) 1057 (C. C. A. 4th).

CONCLUSION

It is respectfully submitted that the judgment for plaintiff rests upon speculative evidence; that there is no substantial evidence of the permanence of total disability during the life of the contract; that the Court erred in admitting opinion testimony upon

the ultimate question to be determined by the trial;
and that the judgment herein should be reversed.

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United States
Circuit Court of Appeals
For the Ninth Circuit. 8

UNITED STATES OF AMERICA,
Appellant,
vs.

MARTHA La FAVOR, as Administratrix of Estate
of CHARLES V. La FAVOR, deceased, and
LUCY ANN La FAVOR,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division.

FILED

MAY - 1 1934

PAUL P. O'BRIEN,

CLERK

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For Defendant:

ANTHONY SAVAGE,
United States Attorney,
Postoffice Building,
Seattle, Washington.

TOM DeWOLFE,
Assistant United States Attorney,
Postoffice Building,
Seattle, Washington.

In the District Court of the United States, Western
District of Washington, Southern Division.

No. 8120

MARTHA M. LaFAVOR, Administratrix of the
Estate of CHARLES V. LaFAVOR, Deceased,
and LUCY ANN LaFAVOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

THIRD AMENDED COMPLAINT.

Comes now the plaintiffs and for cause of action
alleges:

I.

That the plaintiff, Martha M. LaFavor, administratrix of the Estate of Charles V. LaFavor, deceased, is a resident of Pierce County, Washington, and that she is the duly appointed, qualified and acting administratrix of the estate of Charles V. LaFavor, deceased; that said Charles V. LaFavor, deceased, died in Puyallup, Pierce County, Washington, on January 11, 1932; that the above entitled cause was pending at the time of his death and said Charles V. LaFavor was the original plaintiff herein; that the plaintiff, Lucy Ann LaFavor, is the mother of said deceased, and is the original beneficiary, named in the War Risk Insurance policy hereinafter described.

II.

That in the month of October, 1917, desiring to be insured against the risks of war said Charles V. LaFavor, deceased, applied for a policy of war risk insurance in the sum of \$10,000.00, and thereafter there was deducted from his monthly pay the sum of \$6.40 per month, and subsequently thereto there was duly issued to him a policy of war risk insurance by the terms whereof the defendant agreed to pay said Charles V. LaFavor, deceased, the sum of \$57.50 per month in the event he suffered total and permanent disability while said policy was in full force and effect; that after his aforesaid discharge, the said Charles V. LaFavor, deceased, believing that said war risk insurance had [1*] elapsed, made application and was granted reinstatement of \$3,000.00 thereof, that the original war risk insurance in the sum of \$7,000.00 is the only policy in question herein.

III.

That about the month of January, 1918, said Charles V. LaFavor, deceased, contracted scarlet fever and pleurisy, and later in the month of September, 1918, in the Argonne Forests, France, said Charles V. LaFavor, was wounded from a fragment of a high explosive shell, and from concussion was thrown into a shell hole and partially buried causing a severe shock to his nervous system and complicated injuries to his spinal column, and as a re-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

sult of the foregoing developed hypertrophic arthritis of the lumbar spine, causing partial paralysis of the left leg and caused internal injuries to his lungs, liver and heart, that as a result of the foregoing said Charles V. LaFavor was discharged as aforesaid totally and permanently incapacitated from following continuously any substantially gainful occupation by reason whereof he became entitled to receive from the defendant the monthly payments on \$7000.00 of the original war risk insurance, granted said Charles V. LaFavor, deceased, as provided in said policy of war risk insurance, in case of total and permanent disability.

IV.

That said Charles V. LaFavor, deceased, made due proof of said total and permanent disability to the defendant and had demanded payment of the aforesaid amount, but the defendant has disagreed with said deceased and has refused and still refuses to pay the same or any part thereof.

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of \$7,000.00 and any additional amount or amounts that may be due under the terms of said policy of war risk insurance as plaintiff's respective interest may be, [2] together with their costs and disbursements herein.

A. W. NEWMAN
Attorney for Plaintiff.

State of Washington,
County of Pierce—ss.

Martha M. LaFavor, being first duly sworn on oath deposes and says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing third amended complaint, knows the contents thereof and believes the same to be true.

(Signed) MARTHA M. LaFAVOR

Subscribed and sworn to before me this 29th day of September, 1933.

[Notary Seal]

A. W. NEWMAN

Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed Sep. 30, 1933. [3]

[Title of Court and Cause.]

ORDER JOINING PARTY PLAINTIFF.

This matter coming on regularly for hearing on motion of E. C. Whitley, Special Representative for the Attorney General of the United States, and the Court having been advised in the matter, it is hereby

ORDERED that Lucy Ann LaFavor, mother of the deceased plaintiff herein, Charles V. LaFavor, be made a party plaintiff in the within action within five (5) days from the date of this order; or in the alternative it is

ORDERED that the said Lucy Ann LaFavor be joined herein by being made a party defendant and served in the usual manner.

Done in Open Court this 26th day of September, 1933.

(Signed) EDWARD E. CUSHMAN,
Judge.

O.K.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 26, 1933. [4]

[Title of Court and Cause.]

ANSWER TO SECOND AMENDED
COMPLAINT.

Comes now the United States of America, defendant, above named, by Anthony Savage, United States Attorney, Western District, Washington, Tom DeWolfe, Assistant United States Attorney, same district, and Joseph Mallery, Assistant United States Attorney, same district, and for answer to the plaintiff's second amended complaint, herein admits, denies, and alleges as follows:

I.

It is admitted that Charles V. LaFavor died January 11, 1932, and that the above entitled cause was pending at the time of his death, but denies that it has sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations therein contained, and therefore denies the same.

II.

It is admitted that while in military service Charles V. LaFavor applied for and was granted a policy of War Risk Term Insurance in the amount of \$10,000 (ten thousand dollars), by the terms of which defendant agreed to pay said Charles V. LaFavor the sum of \$57.50 (fifty-seven dollars and fifty cents) per month in the event he died or suffered permanent and total disability while said policy was in full force and effect.

It is admitted that subsequent thereto said Charles V. LaFavor made application for and was granted reinstatement of \$3,000 (three thousand dollars) of the original \$10,000 (ten thousand dollars) insurance granted, and that the same was later converted and was in full force at the time of the insured's death. [5]

III.

For answer to Paragraph III of plaintiff's Second Amended Complaint, the defendant denies each and every allegation contained therein.

IV.

For answer to Paragraph IV of plaintiff's Second Amended Complaint, the defendant denies each and every allegation contained therein.

FOR A FURTHER ANSWER and by way of a FIRST AFFIRMATIVE DEFENSE, defendant alleges as follows:

I.

That the \$10,000 (ten thousand dollar) War Risk Term Insurance granted Charles V. LaFavor during

his period of service lapsed for non-payment of the premium due thereon April 1, 1919, and was not in force or effect thereafter except for the \$3,000 (three thousand dollars) thereof which was reinstated and in force at the time of his death.

WHEREFORE, having fully answered, the defendant prays that this action be dismissed and that it may go hence without day and recover its costs and disbursements herein.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Assistant United States Attorney.

JOSEPH A. MALLERY,

Assistant United States Attorney. [6]

United States of America,
Western District of Washington,
Southern Division.—ss.

Tom DeWolfe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, Southern Division, and as such makes this affidavit on behalf of the defendant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE

Subscribed and sworn to before me this 25 day of September, 1933.

[Seal]

E. W. PETTIT,

Deputy Clerk, U. S. District Court, Western District
of Washington.

Received a copy of the within this 25 day of Sept., 1933.

A. W. NEWMAN,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 25, 1933. [7]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of September, 1933, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

No. 8120

[Title of Cause.]

RECORD OF HEARING.

On this 30th day of September, 1933, this cause comes on for hearing on motion of the Government to strike the cause from the trial calendar, plaintiff appearing by J. T. McCutcheon, Esq., her attorney. Telegram from Lucy Ann LaFavor is filed, the telegram being authorization for A. W. Newman and J. T. McCutcheon to act as attorneys for the said Lucy Ann LaFavor. Third Amended Complaint is filed showing additional party plaintiff.

The Government withdraws its motion to strike

cause from the trial calendar and stipulates that defendant's Answer to Second Amended Complaint heretofore filed shall stand as answer to the Third Amended Complaint. [8]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiffs above named by their attorneys A. W. Newman and John T. McCutcheon, and for reply to defendant's answer to second amended complaint, deny and allege as follows:

I.

Deny each and every allegation and thing set forth in defendant's first affirmative defense thereof.

WHEREFORE, having fully replied, plaintiffs renew their prayer as set forth in their third amended complaint.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attorneys for Plaintiffs.

United States of America,
Western District of Washington,
Southern Division.—ss.

Martha LaFavor, being first duly sworn on oath, deposes and says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing reply, knows the contents thereof and the

statements therein contained are true as she verily believes.

(Signed) MARTHA M. LaFAVOR

Subscribed and sworn to before me this 4th day of October, A. D. 1933.

[Notary Seal] JOHN T. McCUTCHEON,
Notary Public in and for the State of Washington,
residing at Steilacoom.

[Endorsed]: Filed Oct. 4, 1933. [9]

[Title of Court and Cause.]

VERDICT.

We, the jury empanelled in the above-entitled cause, find for the Plaintiffs and further find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919.

(Signed) CHAS. C. MILLER,

Foreman.

[Endorsed]: Filed Oct. 6, 1933. [10]

[Title of Court.]

RECORD OF PROCEEDINGS.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the sixth day of October, 1933, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken

and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

RECORD OF FURTHER TRIAL.

On this 6th day of October, 1933, all parties being present, come the jury into court, and all being present, roll call is waived and the jury return a verdict as follows: "We, the jury empanelled in the above entitled cause find for the plaintiffs and further find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919. Chas. C. Miller, Foreman."

Whereupon the said verdict is received and filed and the jury is discharged from further consideration of this case.

The Court fixes Saturday, October 14th for settling Findings and Judgment, and the Government is granted until and including January 2, 1934, for serving and lodging its Bill of Exceptions. [11]

In the District Court of the United States, Western
District of Washington, Southern Division.

No. 8120

MARTHA M. LaFAVOR, Administratrix of the
Estate of CHARLES V. LaFAVOR, Deceased,
and LUCY ANN LaFAVOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above cause coming on for trial on the 3rd day of October, 1933, and the plaintiffs appearing by their attorneys, A. W. Newman and John T. McCutcheon, and the defendant being represented by its attorneys, Tom DeWolfe and Joseph Mallery, assistant United States Attorneys and Earl C. Whiteley, and a jury having been impanelled to try said cause, and the parties having submitted their testimony to the court and jury, and the court having instructed the jury as to the law applicable to said cause, and the jury having returned a verdict finding for the plaintiff, and substantially as follows:

“We, the jury in the above entitled cause, find for the plaintiff and find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919.”

now, therefore, it is

ORDERED, ADJUDGED AND DECREED
that the plaintiff, Martha M. LaFavor, administra-

trix of the estate of Charles V. LaFavor, deceased, have judgment against the United States of America for all installments accruing since March 24th, 1919, to January 11, 1932, upon the policy of War Risk Insurance described in plaintiff's complaint herein, wherein Charles V. [12] LaFavor, deceased, is the assured, amounting to the sum of \$6198.50, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff, Lucy Ann LaFavor have judgment against the United States of America for all installments accruing on said policy of War Risk Insurance since January 11, 1932, amounting to \$805.00, and for any and all installments on said policy of War Risk Insurance that will become due in the future until the entire amount of said policy is paid in full, and it is further,

ORDERED, ADJUDGED AND DECREED that the attorneys for the plaintiffs, A. W. Newman and John T. McCutcheon, are allowed ten per cent of any recovery now or hereafter made as the result of this action, payable as such amounts fall due as attorneys fees.

DONE in Open Court this 17th day of October, 1933.

EDWARD E. CUSHMAN,

Judge.

O.K. as to form

TOM DeWOLFE

Asst. U. S. Atty.

Examined and Approved this 17th day of October, 1933.

.....
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 193. J & D 3, Pg. 85. [13]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, The United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Asst. United States Attorney for said district, and moves this Honorable Court for a new trial of the above entitled case, on the following grounds:

1. That the verdict herein is contrary to law and the evidence.
2. Error in law occurring at the trial and duly excepted to at the time.

ANTHONY SAVAGE

United States Attorney.

TOM DE WOLFE

Asst. United States Attorney.

Received a copy of the within this day of, 19.....

ANDREW NEWMAN

JOHN T. McCUTCHEON

Attorneys for plaintiff.

[Endorsed]: Filed Nov. 27, 1933. [14]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR NEW TRIAL.

Defendant's motion for new trial having come on for argument on the date mentioned below and the motion having been submitted to the Court without argument and the Court being duly advised in the premises, now, therefore

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion for a new trial be and the same hereby is denied.

Done in open Court this 16th day of December, 1933.

EDWARD E. CUSHMAN

United States District Judge.

Defendant excepts. Exception allowed.

EDWARD E. CUSHMAN

District Judge.

[Endorsed]: Filed Dec. 11, 1933. [15]

G. O. B. 8, Pg. 847

[Title of Court and Cause.]

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of the parties, it is hereby

ORDERED that defendant herein may have up to and including the 16th day of Jan. 1934, in which to lodge its proposed Bill of Exceptions herein, and serve the same.

Done this 27th day of Dec. 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 27, 1933. [16]

[Title of Court and Cause.]

ORDER

Upon application of the defendant herein, and pursuant to stipulation of all parties, it is hereby

ORDERED that defendant herein may have up to and including the 17th day of Febr., 1934, in which to have settled its proposed Bill of Exceptions herein; and it is

Further ORDERED that the July 1933 term of Court date for that purpose.

Done in open Court this 16th day of January, 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Atty. for Plts.

[Endorsed]: Filed Jan. 16, 1934. [26]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the U. S. District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 26th day of January, 1934, the Hon. Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

[Title of Cause.]

ORDER.

On this 26th day of January, 1934, it is by the Court ordered that the time for settlement of the Bill of Exceptions in the above entitled cause be and hereby is fixed for February 10, 1934 at the hour of ten o'clock in the forenoon.

The Clerk is directed to notify counsel of this Order. [27]

[Title of Court and Cause.]

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of all parties, it is hereby

ORDERED that defendant herein may have up to and including the 15th day of March, 1934, in which to transmit its record on appeal herein to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 30th day of January, 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Attys. for Plaintiff.

[Endorsed]: Filed Jan. 30, 1934. [28]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 13th day of February, 1934, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

CONTINUANCE.

On this 13th day of February, 1934, settlement of the proposed Bill of Exceptions in the above entitled cause is passed to the first regular motion day in March, 1934. [29]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 16th day of February, 1934, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

ORDER EXTENDING TIME.

On this 16th day of February, 1934, the plaintiff appears by A. W. Newman, one of her attorneys, and the Government appears by Asst. U. S. Attorney Tom DeWolfe. It is ordered that the time for settling Bill of Exceptions is fixed for February 21, 1934 at two o'clock P. M., and the Government is allowed to and including March 20, 1934 to file its record in the Circuit Court of Appeals for the Ninth Circuit. [30]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF
EXCEPTIONS.

BE IT REMEMBERED that heretofore and on, to wit, the 3d day of October, 1933, at the hour of ten o'clock A. M., the above entitled cause came regularly on for trial in the above entitled Court

before the Honorable Edward E. Cushman, Judge of said Court, sitting with a jury, in the courtroom of the Federal Building, at Tacoma, Washington, the plaintiff Martha M. LaFavor appearing in person and by her attorneys, John T. McCutcheon and A. W. Newman, and the plaintiff Lucy Ann LaFavor not appearing and being represented by her attorneys John T. McCutcheon and A. W. Newman, the defendant appearing by its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District.

WHEREUPON, the jury being duly empaneled and sworn to try the cause, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF JULIUS ENGLUND,

For Plaintiffs

JULIUS ENGLUND, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on [31]

Direct Examination.

By Mr. NEWMAN:

My name is Julius Englund. I live at Route 5, Box 84, Tacoma, Washington. I was in the military service during the World War with Company A, 362d. I knew Charles LaFavor while I was in the service. He was with Company A, 362d. We were both in the same organization. I met him in the Company—he was in the hospital at the time at Fort Lewis. That was about 1918. I was at

(Testimony of Julius Englund.)

Camp Lewis about three months. Mr. LaFavor was in the hospital at Camp Lewis when I got to the Company. After I joined the Company he remained there until the latter part of May. I joined the Company in the middle of April. At the time I joined the Company he was in the hospital and remained there until the latter part of May. From Camp Lewis we entrained for Camp Merrick, New Jersey. Mr. LaFavor went with the organization. From Camp Merrick, New Jersey, we went to Southampton, England, and Mr. LaFavor was with the organization, at that time. From Southampton we went to La Havre, France, and Mr. LaFavor went along. From La Havre we went to Demartine, France, and Mr. LaFavor went with the organization there. I was with the Company then for approximately three weeks and then I was sent to the hospital. Mr. LaFavor was with the Company during those three weeks. I met Mr. LaFavor again up here at the Cushman Hospital. I did not see him in France again. I was with the organization again in France. I joined the organization again in France up in the Argonne woods, that was up on the front line. Mr. LaFavor was not with the organization then. I went back to Company A 362d Infantry at the Argonne Forest. Mr. LaFavor was not with the organization at that time. I went back to Company A 362d [32] Infantry at the Argonne Forest after they made the first drive—I should judge it would be the 30th of September. I

(Testimony of Julius Englund.)

was not with that organization during the first drive,—I was in the hospital. I joined the organization when they were making their second drive. I next saw Mr. LaFavor at the Cushman Hospital, in Tacoma, in the early part of 1927, if I remember right. I was at the Cushman Hospital at that time. I did not know Mr. LaFavor before he went into the service.

Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?

A. Well, there was quite a difference in him; he was going around limping.

Q. He was limping?

A. Yes.

Q. What else?

A. Complaining about his side.

Mr. DeWOLFE: We move to strike that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Motion denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I did not have an opportunity to see his left arm at that time, nor his chest. I cannot recollect just at this moment what, if anything further was noticed by me that was different at that time. [33]

(Testimony of Julius Englund.)

Q. Did you observe any difference in his complexion?

Mr. WHITLEY: That is leading, if the Court please.

The COURT: Objection overruled. Answer that yes or no and wait for another question.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I observed a difference in his complexion, he had a sallow complexion, at Cushman Hospital. When I first met him at Cushman Hospital I observed a difference in his posture; he never walked erect.

Q. Will you tell the jury just how he did walk?

A. He always walked with a cane stooping over forward, sort of favored his left side.

Mr. DeWOLFE: We move to strike, he "sort of favored his left side".

The COURT: Denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

Q. Did he at that time make any complaint to you about his heart?

Mr. DeWOLFE: We object to that as leading and as hearsay and depriving the Government of the right of cross-examination.

The COURT: Objection overruled. The witness is instructed that that means any complaint he made when he claimed to be, at the time of making the complaint, suffering in regard to his heart—not telling about something that had happened be-

(Testimony of Julius Englund.)

fore, but any complaint regarding his present condition at the time he made the complaint. [34]

Mr. DeWOLFE: Exception.

The COURT: Exception allowed.

He made no complaint to be about his heart at that time. At that time he complained to me about pain in the chest. He said he had pain in the chest but he did not say anything more definite about it. I was a patient at the hospital at that time. I was in the same ward with Mr. LaFavor. I had an opportunity to observe him in that ward. Mr. LaFavor was just like all the rest of the patients, able to get up at his leisure.

Julius Englund testified as follows on

Cross Examination.

By Mr. DeWOLFE:

The last time I saw him overseas was at Demartine, in 1918. I did not see him again until I saw him in Cushman Hospital in 1927.

TESTIMONY OF WILLIAM HARTWICH,
for Plaintiffs.

WILLIAM HARTWICH, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My name is William Hartwich. I live at Route 4, Box 715 A. With reference to where Mrs. LaFavor

(Testimony of William Hartwich.)

now lives, it is two 10-acre tracts between her place and ours. I would say I live about one block from there. I met Charles V. LaFavor just shortly after I bought this land out there where we live at the present time. That was in April 1931. Mr. LaFavor was not living there then—he was just trying to [35] erect his house at the time and I became acquainted with them then. By “them” I mean Mr. and Mrs. LaFavor and their family. It was about a three room house he was building at the time. She did most of the work, what I saw of it, she did most of the work; he did, maybe, the light work, like hammering and light work fitting it up. She sawed the boards, as far as I saw; I don’t remember seeing him saw one. I have to carry my own water and I drive by the place every day and in winter, every other day, and while he was building the house—he never worked long hours on it from what I saw. That was in the summer of 1931. He would get back there in the neighborhood of ten o’clock, he and his wife and children, and he would leave in the neighborhood of maybe three or four o’clock in the afternoon—the times I did see him, when he was out there. They moved into that place. There may be an attic in it; I have never been up in the house; it is not a two-story house. He came up to my place one time when I was digging a well. That was in July or the first part of August, 1931.

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting

(Testimony of William Hartwich.)

some water) and he came up to see how the well was coming along and we asked him to look into it; he says "No, I can't look down".

Mr. WHITLEY: I object to what he said.

The COURT: Objection overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed.

Q. He said on account of what? [36]

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down——

Mr. DeWOLFE: We object to that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: On that point, I would like to have Your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The COURT: You may produce that at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWOLFE: The only case I found that admitted such statements was explanatory of the

(Testimony of William Hartwich.)

mental condition of the insured—other cases ruled them out even when taken by a physician.

The COURT: The objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

At that time the well was—we were only about 26 feet. I lived neighbors to them from 1931 on to the time of his death. I believe it was in January 1932 that he died, if I remember—I don't remember the dates. [37] I was present at the house very shortly before he died. I saw him. He was in bed. The time I saw them working, building the little house, that was in the summer, July, or that neighborhood. I did not see him a great deal during the fall or winter of 1931 prior to his death. I had lots of work of my own and I very seldom went down that way, outside of passing by when I went by. I did see him from time to time. He never did walk straight from the time I saw him. He was always kind of stooped. I would not want to say which way, left or right. At the time I saw him he did not have a cane. He just got out of the car and we would talk a few minutes when I would go down there. His complexion from the time I very first met him—I kind of looked twice because I never knew the man was very sallow and yellowish and I know he had kind of a twitch to his face. You could see one side of his face twitch up. The very first time I met him, I talked to the man between ten and fifteen minutes and there were four or five times then that his face twitched, in that

(Testimony of William Hartwich.)

length of time. It was more one side of the face, not the whole face. I could not say whether or not he shook his head at the same time. I did not have occasion or opportunity to observe him strip down, in any of his limbs, arms or legs. At the time I knew him, I would say he weighed in the neighborhood of 140 pounds, not over that at the most. I brought a doctor up to Mr. LaFavor's house prior to his death.

William Hartwich testified as follows on

Cross Examination.

By Mr. DeWOLFE:

The first time I saw him was in 1931. During the [38] summer of 1931 he passed down by the house as he was going down. I would get out early and start clearing my land. He would drive by and once in a while he would stop; another time, he would wave as he was driving by. During that summer I went down several times. We were working on the school situation and I had quite a talk with him. Mr. LaFavor drove by my house. He had a car that he was driving then, a Chevrolet sedan. He was driving it himself. I would see him Sundays, the biggest share of the time until I moved out there—that I would see him come out driving that car. I saw him doing some work on the house, very light. I saw him as early as ten o'clock in the morning and as late as four o'clock in the afternoon.

William Hartwich testified as follows on

(Testimony of William Hartwich.)

Redirect Examination.

By Mr. McCUTCHEON:

Mr. LaFavor was just about dead as I got there. Mrs. LaFavor came up after me and I went in to get the doctor. I was present at his bedside with the doctor at the time he died. He was beyond making statements; he was unconscious at the time.

JULIUS ENGLUND,

recalled, testified as follows on

Direct Examination.

By Mr. McCUTCHEON:

I saw Mr. LaFavor at Fort Lewis in 1918 after I came out of the hospital. The Company was then doing infantry drill. Mr. LaFavor did not join the infantry drill. The infantry drill consisted of field drilling, doing formation,—heavy work. After I came out of the hospital, Mr. LaFavor was doing officers' quarters work, light fatigue work, consisting of sweeping out, taking care of the officers' [39] quarters.

TESTIMONY OF MARTHA M. LaFAVOR,
Plaintiff.

MARTHA M. LaFAVOR, one of the plaintiffs herein, after being first duly sworn on oath, testified as follows on

(Testimony of Martha M. LaFavor.)

Direct Examination.

By Mr. McCUTCHEON:

My name is Martha M. LaFavor. I am one of the plaintiffs in this action. I am the duly appointed administratrix of the estate of Charles LaFavor, appointed by the Superior Court of Pierce County, Washington. I live at Route 3, Box 2368, Puyallup,—that is my route number—I live on East 72d Street. I now live in the place where Charles LaFavor died. Lucy Ann LaFavor is my husband's mother. She will be 86 this coming birthday. She stayed with me. Now, she is visiting some folks. Before I was married I was from Scobey, Montana. I believe Scobey is in eastern Montana. I first met Charles V. LaFavor—well, we lived right across the road from each other—we were neighbors, at Scobey, Montana. That is a town about like Puyallup. I first met him in 1917. At that time he and I worked together. I worked in a restaurant and he was doing cement work for his brother, building a big building. When that was done he was digging a well with pick and shovel. I was keeping company with him at that time. He worked at the cement work until they had the building done—until May, 1917. Then he went to digging a well for a man by the name of Lynch, digging with pick and shovel. He worked on that well two months in the spring and summer of 1917. Then he worked in the lumber yard, The Curtis Lumber yard, piling up lumber. We were engaged to be married in June,

(Testimony of Martha M. LaFavor.)

1927. [40] He left for Fort Lewis, September 18, 1917.

Q. Now, at that time, Mrs. LaFavor, do you know how much he weighed?

Mr. DeWOLFE: I object to that.

A. He weighed 175.

Mr. DeWOLFE: We object to that until it is shown that it is not hearsay.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

He weighed 175 pounds. From the time I first met him, up until the time he left for Fort Lewis—it was early 1917, early spring, until the morning he took the train, in September, 1917. During those months I would see him every day, sometimes twice a day. Before the war, during that time, I did not see him in bed or incapacitated from illness. He was very healthy, strong, nice healthy looking man; never had any illness. He was five foot, six. When he left for Fort Lewis on September 18, 1917, I received letters from him from Fort Lewis, up until he left for France. We got a card from him that the ship was sailing, that was in 1918; I don't remember the month. In 1918, the first part of the fall, I again received a letter from him after the card which I received telling me he was sailing. I haven't the letters; my husband destroyed it two weeks before he died. The envelope is destroyed as well as the letter. It was postmarked in France; he was in the base hospital. I got three letters, as

(Testimony of Martha M. LaFavor.)

often as one month or two months—we did not get the mail regular. We got one letter from him post-marked from the base hospital. We heard [41] from him again in April—no, not April; in February, 1919. We got a letter. He arrived back on the first of April, 1919. I met him at his home, in Scobey, Montana. I saw him April 21, 1919. When I met him he was lying down on the bed—when I first saw him. He got up and walked with a cane. He walked with a cane three months after he got out. When I saw him, his mouth was all full of blisters, his eyes were bloodshot and he had scabs on his head—it was full of scabs. He was yellow and very blue about his eyes. He was skinny.

The Plaintiff, Martha M. LaFavor, testified as follows on

Cross Examination

By Mr. DeWOLFE:

I could not be there when he was weighed. He weighed himself before he went away—I saw him. When he came back I was present when he weighed. I saw how much he weighed by the scales—he and I weighed.

The Plaintiff, Martha M. LaFavor, testified as follows on

Redirect Examination

By Mr. McCUTCHEON:

He weighed 130 pounds. He had light clothes on.

TESTIMONY OF W. H. GEARING,
For Plaintiffs

W. H. GEARING, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination

By Mr. NEWMAN:

My name is W. H. Gearing. I practice medicine at Tacoma, Washington, Medical Arts Building. I have practiced here three—four years. I am a graduate of the University of Iowa. I am specializing in bone and joint disorders. I know a man by the name of Charles LaFavor, now [42] deceased. I examined him during his lifetime. I first saw Mr. Charles LaFavor on the 14th of October, 1931. I examined Mr. LaFavor at that time. From my examination I found a condition of traumatic arthritis. The word “traumatic”, of course, means injury, of any type, a direct or indirect injury, and arthritis is rheumatism in the joints as a result of an injury. At that time Mr. LaFavor gave me a history of his condition; that is the usual procedure for examination, a history and examination. We always use a history as a help in making a diagnosis. The first thing, we ask if there has been any previous injury or diseases that the man had had and he gave this history to me; he had scarlet fever in 1918 while he was in the service at Camp Lewis; he had pneumonia in 1918, pleural pneumonia, and he also gave a history of having the grippe in 1918, while in France; he gives a history of sore throat; he has had rheumatic fever while he was in France, and

(Testimony of W. H. Gearing.)

on questioning, whether he had pleurisy, he acknowledged he had pleurisy for which he was tapped in 1918, out at Fort Lewis. His chief complaint was pain in the lower back and left leg; then we got the clinical history; present complaint dates back to 1918, while in the service in France. He gives (practically the patient's words)—he gives a history of the explosion of a large shell in which he was buried in the dirt, was knocked down by this explosion—kept in bed in the base hospital five months; he was treated by heat, massage and therapy. That was the history up to his present illness; he had never gotten over the lower back pain, pain in the lower back, with weakness; catches cold very easily; the pain is aggravated; also exertion causes pain; kept awake at nights—in wet weather, caused pain and he complained of pain when [43] stooping over and also when doing extensive walking. That is the history up to the examination. I have a note here that his heart was a little enlarged; the man wore glasses and he was quite constipated—gastro-intestinal disorder, constipated; from his remarks and what I found out from the examination. I x-rayed the patient. I have the x-rays here.

Q. I am handing you this x-ray, plaintiffs' exhibit 11; Doctor, I will ask you what that is?

A. That is a picture of the—what we call, the lumbo-sacral spine—of the pelvis.

Q. Is this an x-ray of Charles LaFavor?

A. It is.

(Testimony of W. H. Gearing.)

Mr. NEWMAN: I offer it in evidence.

Mr. WHITLEY: Was that taken by yourself, Doctor?

A. It was taken by the man who does my x-ray work.

Mr. WHITLEY: It wasn't taken by yourself?

A. No.

Mr. WHITLEY: I object to it as not properly identified.

Q. Were you there when this was taken?

A. The man was referred to the floor above me, the picture was taken up there and the picture immediately sent down by the patient.

The COURT: "Immediately"—how soon?

A. As soon as the picture was developed.

The COURT: That is, in relative time?

A. Five or ten minutes.

The COURT: Overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed.

Plaintiffs' exhibit 11, the x-ray last above referred to, admitted in evidence and made a part of the record herein. [44]

(Witness places x-ray in shadow box, and testifies therefrom.)

This is a picture of the lower spine, lumbar spine, and the pelvis including the hip joints; a physical examination of this man showed trouble in the left sacro-iliac joint, which is this joint you see here, the joint between the two pelvic bones, where it meets the sacrum, which is at the lower end of the spine. We have evidence in the increased

(Testimony of W. H. Gearing.)

density in this joint here of an arthritic process, which is also at the same time shown by the tilting of the spine to the opposite side of the injury, which we call a "position hauncha", which means that the patient assumes the position most comfortable, which is, naturally, away from the side of the trouble and you notice this spine tilting over towards the right. The increased density is shown right in this lower portion (indicating on x-ray) of this sacro-iliac joint—plus the physical examination, and from that point we make our diagnosis.

Injury and infections will give us arthritis. From his history of an injury, which occurred years before, of course, when this picture was taken, he had constant trouble in that locality from an injury he received while in France—it is possible to assume that the injury was the exciting cause of the trouble.

(Plaintiffs' exhibit #12 handed to Dr. Gearing by Mr. Newman.)

Q. Doctor, was this taken in the same manner as the previous exhibit?

A. It was.

Q. At the same time?

A. Same time. [45]

Mr. WHITLEY: I object to it as not properly identified.

The COURT: Is it offered?

Mr. McCUTCHEON: Yes.

The COURT: It is now offered?

Mr. McCUTCHEON: Yes.

The COURT: Objection overruled.

(Testimony of W. H. Gearing.)

Mr. WHITLEY: Exception.

The COURT: Allowed.

Plaintiffs' exhibit No. 12, the x-ray last above referred to, admitted in evidence and made a part of the record herein.

This portrays a portion of the cervical spine, portion of the spine, shoulders up to the base of the skull. The patient, at the time of taking the history and examination complained also of pain in the neck and, for that reason, this picture was taken. It shows, it is rather difficult to see a slight roughening between the sixth and seventh cervical vertebrae—also an arthritic process. What caused that is problematical—may be due to injury and infection, chronic infection of some sort. Taking this patient's history into consideration, I would say infection in this particular region was the cause of it. His history as given was that of extensive illness, influenza, pleurisy, which are infections, which very likely produce an arthritis.

Plaintiffs' exhibit #13 is a lateral view of the same portion of the spine, as you saw in this first picture, of Mr. Charles LaFavor. They were all taken the same moment, in the same manner.

Mr. NEWMAN: I offer it in evidence.

Mr. WHITLEY: We object that it has not been properly identified.

The COURT: Overruled, admitted. [46]

Mr. WHITLEY: Exception.

Plaintiffs' exhibit No. 13, the x-ray last above referred to, admitted in evidence and made a part of the record herein.

(Testimony of W. H. Gearing.)

That (indicating plaintiffs' exhibit number 13) portrays a lateral view through the lower spine in this direction rather than from the front to the back as in the other picture. This picture shows a slight slipping of the sacrum, which is this lower end of the spine, below the last lumbar vertebra, which you see here (indicating) as you follow the curve along here, there is a slight forward slipping of this into that one. That means in all likelihood a traumatic injury, slipping of this sacrum forward. The term "traumatic" means as the result of an injury. From my examination of Mr. LaFavor, I would say that his was a chronic condition. In my opinion, the exact time of this condition would be difficult to tell but I presume a period of years, which we based on the standpoint that the spine has compensated by its tilting away from the side of the injury, which does not occur immediately.

Q. From the history as given you by the patient, have you any opinion, as to when this arthritis originated?

Mr. WHITLEY: We object, if the Court please.

The COURT: Overruled.

Mr. WHITLEY: Exception.

The COURT: That can be answered yes or no.

Mr. WHITLEY: Exception.

The COURT: Allowed.

(Reporter repeats question) [47]

A. Arthritis originated as the result of the injury sustained at the time of his injury in battle or whenever the injury occurred.

(Testimony of W. H. Gearing.)

Mr. WHITLEY: I move the answer be stricken as not responsive.

The COURT: It was not responsive but objection overruled. It called for a yes or no answer.

Mr. WHITLEY: Exception.

The COURT: Allowed.

I am familiar with the occupation of general farming.

Q. In your opinion, Doctor, would you say that Mr. LaFavor at any time since he contracted this disease, could have continuously followed the occupation as a general farmer?

Mr. WHITLEY: I object, first, on the ground if the Court please, it doesn't properly state the evidence in the case—not the proper foundation for a hypothetical question.

Mr. DeWOLFE: In this connection, may I be heard? In a recent case in the Circuit Court of Appeals—U. S. v. Soule, where apparently a lay witness was allowed to answer a hypothetical question as to whether in his opinion the man could continuously follow a gainful occupation, the Circuit Court of Appeals said in that case: (Reads citation).

The COURT: The objection is sustained. The Court is not inclined to deny a witness, qualified as the doctor is, to express an opinion regarding the particular occupations that a person suffering from a condition that the Doctor is familiar with—or not able to perform—but just to sum it all up by asking a sweeping inquiry, as to any substantially gainful occupation, the Court cannot assume [48] he is

(Testimony of W. H. Gearing.)

familiar with all sorts of gainful occupations. Objection sustained.

Mr. McCUTCHEON: The question here was regarding farming—he particularizes farming.

The COURT: You got so far from the question—I certainly understood, any substantially gainful occupation.

Mr. NEWMAN: The question was general farming.

The COURT: I misunderstood the question. Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

The REPORTER: (Repeats the question)

Mr. DeWOLFE: It invades the province of the jury.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I don't think he would be able to follow the occupation as a farmer. I don't think he can follow the occupation of a farmer at the time I saw the patient.

W. H. Gearing testified as follows on

Cross Examination

By Mr. WHITLEY:

Of course, if the history as given by Mr. LaFavor to me was not in accordance with the actual facts, it would make a difference in my answers to these questions. In arriving at a diagnosis, the

(Testimony of W. H. Gearing.)

history, physical findings and the x-ray, we base our diagnosis on those three findings. I was not present while the technique of taking the x-rays was being done. In the request for the x-ray, as done, I ask for a picture taken in a certain position and the tech- [49] nique is carried out by the technician as requested. The first film I exhibited to the jury showed an arthritic condition. As to how long the process had been going on, looking directly at the point of pathology and looking at the picture from the standpoint of the tilting of the spine, I would say that it did not occur immediately; that it was of some standing. It is difficult to tell about how long. As to how long it had been in process, from the examination I made, I could say this—probably be a matter of years, rather than just the last week or so. That process would assume the proportions that are shown by the x-ray in two or three years. In my opinion, traumatic result of an injury was the cause of that arthritis. You cannot tell by the film whether it is infectious or traumatic. I arrived at the conclusion it was traumatic from the history of the case. He gave a history of certain diseases which were infectious. And from the history of the infection and injury he received, I arrived at the opinion it was a traumatic condition. I picked out the traumatic rather than infection because the traumatic is an added factor in producing symptoms. Without any trauma or injury the same condition could have been shown. If it resulted from tonsillitis or prostatitis, without any trauma or injury the

(Testimony of W. H. Gearing.)

same condition could have been shown. I examined Mr. LaFavor just the one time, on October 14, 1931. He was referred to me by Dr. Steele for an orthopedic examination. I did not know at the time I examined him it was for the purpose of testifying in this examination. My examination indicated an enlarged heart, and the findings upon which that was based were on percussing the chest. I just marked it down as heart being slightly en- [50] larged; he was sent to us, primarily for the orthopedic examination. I made a complete examination of him at that time from the standpoint of orthopedic bones and joints. In order that it will be clear, I will state again, the difference between a traumatic arthritis and one that results from infection. The pathology—that is the end result—if a person can get arthritis or rheumatism, from an infection,—we all have infections, but the initial symptom or the time that the patient complains of pain, and what goes with an arthritic condition, may begin, and does begin as the result of an injury. Arthritis is a progressive disease. After trauma it usually comes into being practically immediately, from the standpoint of the patient's complaints; from the standpoint of the infection, it may be harbored for years before the symptoms begin. In an x-ray chronic arthritis will become discernible in a period of two or three years, formation of spurs, so on. An acute condition in which the joint is involved, swelling, so on, will be evident quite soon. I found chronic. The condition of arthritis

(Testimony of W. H. Gearing.)

of long standing being more serious or less serious than the early stages depends on the acuteness of the onset; some individuals will get over it readily and others will progress to actual stiffness of the joints. It is difficult to say which ones will do that and which ones will not. I did not examine Mr. LaFavor except on this one occasion.

TESTIMONY OF JOHN F. STEELE,
for Plaintiffs.

JOHN F. STEELE, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. NEWMAN:

My name is John F. Steele. I am practicing medicine [51] in Tacoma. I got my license in the State in 1917 and I came back here to Tacoma in January 1921, after the war. I am a graduate of the University of California. I have practiced medicine since 1917. I have specialized in diseases of the heart and lungs since I was in the Army in 1918. I knew Charles LaFavor, deceased. I examined him during his lifetime. I examined him October 10, 1931. He was in the office the second time and brought a specimen of urine and sputum with him at that time and I just saw him at that time, showed him the x-ray pictures and talked with him but did not examine him; the second time, pre-

(Testimony of John F. Steele.)

scribed for him, that was all. That was the last time I saw him. Mr. LaFavor gave me quite an extensive history before the examination was completed. I usually make my examination first, record my findings, then take a history of the patient after the examination. I made an x-ray of his chest and flouroscopeed him, that is, I looked through him in the dark room with a flouroscope, watching his heart beat and what we call the antero-posterior position, from front to back, 40 degree angle, from each side and looking through from the back and watching the movement of the diaphragm on both sides, as the patient would take a deep breath and then we made a tuberculin—what we call it—and a complete examination, which revealed a poor condition of his teeth, from pyorrhea; his tonsils were out; the larynx was normal; thyroid glands slightly enlarged; glands of the neck, cervical glands were not enlarged and the examination of the heart—of the pulse, with the patient lying on his back, 52 and 64; with the patient standing, his systolic blood pressure, 140; diastolic, 100, which is just a little bit [52] above normal for his age, 39 years. The area of cardiac dullness, as revealed by percussing the chest in this manner (indicating), over the heart and marking it and measuring it, was 8½ centimeters to the left of the midline, 3½ centimeters to the right of the midline and the apex—fifth intercostal space. There were no murmurs, no thrills at the apex, and no irregularity or

(Testimony of John F. Steele.)

arrhythmia of the heart. The lungs—shape, long, *board*, fairly deep mobility, lagging of the left lung; crepitus increased over both uppers; that is to the touch, putting the hand on the chest, we have the patient say “99” or “999” and see the vibration of the chest. The resonance as revealed by percussion of the finger, reveals on the right side decreased resonance, third rib, fourth spine in the back—left lung, decreased resonance, second rib, fifth dorsal spine up and, auscultation, we find bronchovesicular breathing—that is a certain type of breathing that is found in tubercular cases, whether it is active or arrested; it is a sharp inspiration and a long expiration. Normal breathing is a long inspiration and short expiration, and whispered voice, listening through the stethoscope, was found increased over the area from the third rib, fourth spine up, no rales elicited. The left lung, bronchovesicular breathing, increased vocal conduction and prolonged expiration second rib and fifth spine up. Few rather coarse rales heard at the first rib and second dorsal spine. Not the type of rale exactly we hear with active tuberculosis. And so, I marked his diagnosis, after looking at the x-ray, and everything, taking everything into consideration, as a case for observation for activity—not active, however. The abdomen was normal, with the exception [53] of a scar from—the abdomen—there was no hernia, no masses, no tenderness. Extremities—lameness when the patient walked and glandular system negative; for the spinal column,

(Testimony of John F. Steele.)

I referred the patient to Doctors Rich and Gearing for an examination and treatment. I found on the fluoroscopic examination, lagging of the diaphragm on the left side and in the x-ray film, this was seen to be adherent. There was nothing in the history—I mean in the examination of the heart to make a diagnosis of angina pectoris or coronary arteriosclerosis—but in many cases, even examining the patient, when they are having an attack—you cannot tell by a physical examination that they have this disease. So the diagnosis of coronary sclerosis with angina pectoris was made on the history of the case only. Pleurisy chronic fibrous in his left, was the third diagnosis I made. The urine was negative and the sputum examination revealed no tubercle bacilli.

John F. Steele testified as follows on

Cross Examination.

By Mr. WHITLEY:

This examination was not altogether made by me for the purposes of testimony in this case. The man was sent to me by Mr. Newman but after I had examined him and talked with him, he wanted me to treat him also. When I was taking the history and making the examination by reason of him being referred to me by Mr. Newman when he first came to me, yes, but before the examination was completed, Mr. LaFavor said he wanted me to treat him. When Mr. LaFavor came up there and I examined him, I did not have any arrangement with Mr. Newman to make the

(Testimony of John F. Steele.)

examination for the pur- [54] pose of this trial. Mr. Newman merely sent a little slip by the man, referring Mr. LaFavor for examination. I didn't know Mr. Newman, didn't know who he was, didn't know he was an attorney and the man didn't tell me anything about a court case pending. I did not hear from Mr. Newman on it until after the man died, the following January, I believe it was. This examination was made in October.

John F. Steele testified as follows on

Direct Examination (continued).

By Mr. NEWMAN:

Mr. LaFavor enlisted in the United States Army September 18, 1917; was discharged March 21, 1919; was wounded in action September 29, 1918. He has been having pains in the chest, at times very severe, extending to the left arm and ending in the elbow and sometimes down to the fingers and wrist. I remember he said, especially, that the pain hit him right there inside the wrist (indicating). Sometimes the pain was so strong it "rattled his wristbone", is the way he put it, and hit him in the elbow severely. He has had attacks of pain ever since he was in the army. Due to former wounds in action—also, had mustard gas in the war. At times he has had typical attacks of angina pectoris, comes on after eating; patient distended with gas; shortness of breath; pains in the chest and shoulders and arm. Also had trouble with his back, considerable pain

(Testimony of John F. Steele.)

and difficulty in walking. As to his past illnesses, he has had pleurisy at Camp Lewis, in the winter of 1917 and 1918; was tapped five times in the left pleural cavity; scarlet fever soon after this while still in the hospital; then he had either spinal meningitis or diphtheria before leaving [55] the hospital. He believed the doctors decided diphtheria because they gave him diphtheria antitoxin; hospitalized about five months after he was wounded from September 29, 1918 to March 1919. Had Spanish flu while in the hospital; was in the hospital for this.

The first diagnosis, coronary sclerosis with angina pectoris, means a hardening of the little arteries that supply the heart muscles with blood. These arteries when they are hardened, obstructed or narrowed down, cause very severe attacks of pain, pain which comes on very often after eating, especially if the person becomes distended with gas and, in many cases, the very first attack of angina pectoris may cause death but in many other cases, the person may go on and have many attacks and live on for years before it takes his life. I saw Mr. LaFavor just once again during his lifetime, on October 24th. At that time I did not make an examination, just talked to him. I saw him after he died. I examined the body. I made an autopsy. This autopsy was made by Dr. Martin, Pathologist at the Tacoma General Hospital, and myself. It was made on January 13, 1932. I was an associate with Dr. Martin on it. We both performed the autopsy together and I saw everything that he did. I mean I

(Testimony of John F. Steele.)

handled all the tissues that he had and was absolutely with him on the autopsy the same as though I had done it alone, with him assisting me. I did not make a personal examination of all the parts of the body but all the parts in the chest and abdomen, kidneys and spleen, everything. I examined the heart. The heart was not weighed but it was about normal in size for the body of this man, the cardiac muscle is firm, reddish brown in color, [56] muscle shows slight streaking but embalming may have obscured this in part. The endocardium, that is the inner lining of the heart and valves are free from evidences of disease. The first portion of the aorta and that portion giving origin to the coronary arteries shows a very mild hardening and no evidence of specific aortitis—referring to syphilis, no evidence of syphilitic aortitis. The coronary items are hardening and shows areas of calcium deposits, both right and left coronaries about equally involved and show a marked diminution in the calibre of the arteries—on close examination, no actual point of obstruction or complete occlusion were found—that is, they were narrowed down but not to the point of being entirely occluded. And the right lung shows a small scar, that is in the apex of the lungs, but no hilus, calcification; because of embalming, these characteristics are largely obscured. Left lung covered by fibrous tissue which obscures color. There is a slight scar, small amount of hilus. This lung is changed by embalming much as is the right. The liver is normal in size and is normal as is the gall

(Testimony of John F. Steele.)

bladder and the pancreas. The spleen is about twice the normal size. The kidneys normal in size, firm, and the bladder and prostate not removed. Prostate on palpitation is small; aorta shows arteriosclerosis grade one—slightly more conspicuous finding in the abdominal portion. The anatomical portion, first, bilateral cardiac coronary sclerosis with the narrowing of the vessel luminal (lumen is inside of the vessel); second, mild hypertrophy, and third, clinical finding of angina pectoris. Angina pectoris is not a diagnosis exactly but a symptom, a syndrome, a certain picture of symptoms causing pain, severe pain in the chest usually coming after [57] eating and referred to the shoulder and down to the arm to the elbow or to the wrist, sometimes to the finger, caused by the fact that the coronary arteries do not supply sufficient nourishment to the heart muscle. From my examination, I find that to be a chronic condition. It must have existed for many years to cause as much hardening of the walls of the arteries, as the calcification, calcium deposits around the arteries, as it had. Angina pectoris is sometimes caused by infection; sometimes, too hard work, too strenuous work. Of course, shock or injuries may lead indirectly to the beginning of angina—grief. From my examination and from the autopsy I did not find any other disease except what I have stated. We did not make an examination of the spine at the autopsy. Well, my other examination was of the throat and chest and examination of the urine and

(Testimony of John F. Steele.)

sputum, of course, but I did not examine the back or spine at all.

John F. Steele testified as follows on

Cross Examination.

By Mr. WHITLEY:

In my examination of the lungs on October 10, 1931 I did not find a condition upon which to make a diagnosis of active tuberculosis. I made a notation to examine the man at some later date and put it down for observation for activity. I did not re-examine him later. I thought I would have him come in a couple of months from the time I saw him but he did not come in and died about three or four months after that. When he came to see me he asked me to take care of his case. He just came back the once,—that was really to furnish the specimens for my laboratory examination. He just came back once; I prescribed for him the second time and he phoned me a time or two. He phoned me just once—to come out to his house. I was out of the city [58] and I sent someone else. They phoned me the night he passed away. I happened to be on another case at that time so he did not get me. I was not attending him at the time of his death. From the time I examined him in October 1931 up until the time he died, I gave him medicine to take with angina. If you happen to get the right medicine, they can take it over quit a long period of time for these attacks and prevent attacks and he was taking medicine all during that time.

(Testimony of John F. Steele.)

The only diagnosis I made as to the lungs was a diagnosis of chronic pleurisy fibrous and inactive tuberculosis. I based that on the x-ray findings and on the physical examination, the type of breathing and decreased resonance and also on the increased vocal conduction over the upper part of both lungs. The difference of the findings there on the pleurisy and arrested tuberculosis, well, the pleurisy he had—nothing in that except the x-ray—the fact in the x-ray and fluoroscope, the diaphragm was caught up and did not move up and down in the fluoroscope and in the x-ray; there was quite a dense adhesion holding the diaphragm up, due to that old pleurisy with effusions, I suppose. I just gave the findings upon which I based my diagnosis for arrested tuberculosis. The fact, he had decreased resonance and bronchovesicular breathing, increased vocal conduction, prolonged respiration, both lungs, x-ray showed some old scar tissue, upper part of both lungs. In the heart condition, Mr. LaFavor gave me a history of attacks of angina pectoris, attacks of pain and starting in the chest and radiating to the arm, which were typical of angina pectoris. He did not say that word, himself, because he did not know about it but it was very similar to angina pectoris attacks. [59] I did not make any physical findings or any objective findings there that would sustain the diagnosis. Very seldom can this be done. The area of cardiac dullness was just a little bit increased, very little; about 11 centimeters is normal; his was about 12. I would not call that outside of normal limits. That is across

(Testimony of John F. Steele.)

the transverse diameter of the heart on the x-ray film and on percussion. The measurements would be within normal limits of a man's heart of his age and size. The cause of angina pectoris may be infection or overwork, overstudy, strain, grief-stricken, or anything that will bring some additional work on the heart or any additional infection on the heart. When Mr. LaFavor gave me a history of attacks of angina pectoris, he did not say the number. He said he had had attacks every year since the war, of this kind, this character. He did not say whether he had any attacks before the war,—dated back to his sickness and injury in the war. Not many people can have angina pectoris for about 10 or 12 years and have many attacks and still survive, but there are cases on record that do have. He did not tell me how many attacks he had had—he said he had had several attacks every year, from the time of the war. I was on another case and could not get there the night he died but I was still taking care of him. The doctor reported back to me after he passed away. As to the occasion for the autopsy, just as in many cases that die, we like to be sure of our diagnosis. The fact is, almost all of the patients I have that die, I ask for an autopsy and if the relatives grant it, we go ahead and do it. The fact that there was an action pending against the government by Mrs. LaFavor, I think might have had something to do with the reason why the autopsy was performed. We wanted [60] to check up on the diagnosis, to be sure. Going back to my examination, October 10, 1931, so far as I know, there

(Testimony of John F. Steele.)

aren't any objective symptoms there of angina pectoris. I have seen a good many cases of angina pectoris and once in a great while if you examine a patient just when they are having an attack, you might find some little different sound in the heart, ordinarily, but very rarely hear anything different at all, when the person is not having the attack. As to difference in sound, you might find a little murmur. You might find a murmur there that isn't there at any other time and a little sound in the valves, or there might be, present at that time and not at any other time, just when they are having the attack of pain. In angina pectoris there are not particular murmurs that you can find and are spotted as angina pectoris. In a particular examination where you find a murmur, you would not be able to call it angina pectoris. I made the diagnosis of angina pectoris on the history of the case, and knowing the man afterwards; it was confirmed by the autopsy that he had sclerosis of the coronary arteries. The first time that any physical findings were made of angina pectoris, then, was at the time of the autopsy. I think I knew at that time this action was pending against the government—I think just about that time that I knew it. The history that Mr. LaFavor gave me at the time of my examination started when he enlisted in the Army, September 18, 1917. In taking a history we usually take the childhood diseases but he did not give a history of having had any childhood diseases. On this blank, I wrote it out and gave the history as he

(Testimony of John F. Steele.)

gave it to me. I would not say for sure whether or not he gave any [61] history of having any diseases prior to service. I believe I asked about childhood diseases and he denied them. I am not sure of that, though. According to my records his history started when he enlisted in service, September 18, 1917. He did not give me a history of industrial activities; I never take that in the history, nor vocational training, either. If he had given it to me, I would have taken that into consideration. He did not tell me about being a student at the University of Idaho. He did not tell me about the period of time he spent on his farm at Colville.

TESTIMONY OF BERTHA NEHRING,
for Plaintiffs.

BERTHA NEHRING, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCutcheon:

My name is Bertha Nehring. I live at Tacoma, Washington—4927 North Fisher Street. I did not know Charles LaFavor during all his lifetime but I knew him for a short period. He rented a house from me from October 1928 until August 1929. The house was located at 2012 East Gregory Street. It is about a five room bungalow. Towards the last when he moved out, I got \$15.00 a month but at

(Testimony of Bertha Nehring.)

first I got more rent for it. That was to August 1929. During that time I had occasion to see him quite often, sometimes in the home that he rented and sometimes at my home. He used to call at my home to pay the rent.

A. He always appeared nervous and easily agitated about anything.

Mr. DeWOLFE: We move to strike "easily agitated about anything" as a conclusion of law. [62]

The REPORTER: (Repeats the answer.)

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: I did not understand your objection to go to that part of the answer which said "very nervous"—I understod your motion to strike to go to the statement that he was easily agitated?

Mr. DeWOLFE: That is correct, Your Honor.

The COURT: Objection overruled.

His complexion was pale. He was not fleshy. He did not carry himself so very erect as he walked. I recall an occasion in which there was some discussion about the plumbing on the rented house. He spoke rapidly. He changed the tone of his voice, whenever he was talking, I mean with reference to this plumbing. When he left my house, I do not know exactly where he went,—I don't know where he moved to. At the time he was renting from me, I did not see him do any work.

(Testimony of Bertha Nehring.)

Bertha Nehring testified as follows on
Cross Examination.

By Mr. DeWOLFE:

I saw him about once a month when he came to pay the rent, and sometimes a little over. Oftentimes I came up to the home on business. I would see him approximately once or twice a month. He was pale and the tone of his voice changed. I did not see him much after 1929. I did not see him previous to 1928. Of my own knowledge I don't know anything about him previous to that time. [63]

TESTIMONY OF JAMES ELLIOTT,
for Plaintiffs.

JAMES ELLIOTT, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My name is James Elliott. I live on East 72d Street, Tacoma, Washington. I live a little better than 80 rods from where Mrs. LaFavor now lives. I am a laborer. I have lived there about five years, something like that, maybe a little more or a little less. I met Charles LaFavor the first time before he moved out on that place there. I met him three years ago—I can't tell you exactly. I do not know where he was living at that time. That was before he moved out. After he moved out to the place, I might have seen him once a week; might have seen him

(Testimony of James Elliott.)

four or five times a week. I never saw him doing much of anything. He did not have a very good complexion. I could not say as to how he carried himself; I think he limped a little bit in one leg. I can't say which one that was. I did some blasting for him; I blasted on my own and on his place. I would say I did that two years ago, something like that, I can't tell exactly. I think I was there blasting half a day or maybe better—I don't know just how long I was there. I shot a box of dynamite while I was there. I was blowing stumps. I put 8 to 20 sticks under the stumps—that is pretty hard to tell. When the explosion went off it was necessary for me to get away from the stump. I went about 12 to 15 rods away. I would say that Mr. LaFavor was not there with me. He was not helping me blast. He was there; he would not touch it at all. Said he was afraid, made him sick, didn't want anything to do with it, whatever. [64] When the blast would go off, he went out to the road and went up the road better than 80 rods and when he got out on the road he held his hands this way (indicating) and told me not to shoot the dynamite too close until he had plenty of time to get away.

James Elliott testified as follows on

Cross Examination.

By Mr. DeWOLFE:

I have had about 30 years experience blasting. Lots of people, in my experience, who have not had experience in it are afraid of that blasting. I am

(Testimony of James Elliott.)

afraid of it, myself; I want to get away from it. I met Mr. LaFavor about three years ago. He did not move out in my neighborhood; he came and worked on the place. When I first got acquainted with him, he stopped at my place and asked me if there was any more land around there and I told him there was no more, except over the hill. I can't tell you when that was. When he bought that land, I will say I saw him once a week. I saw him up until he died.

TESTIMONY OF BESSIE ELLIOTT,
for Plaintiffs.

BESSIE ELLIOTT, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My full name is Bessie Elliott. I am the wife of James Elliott. I recall when my husband was blasting for Charles LaFavor; I went with him.

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes? [65]

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says——

(Testimony of Bessie Elliott.)

Mr. DeWOLFE: (Interrupting) I object to that as self-serving.

The COURT: It seems to be a statement made, accompanying an act as explanatory of the act; objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

He says "Here's where I am going to get out of here because powder makes me sick and bursts my head to hear the report". So he ran out to the road and he ran up the road about 80 rods with his hands over his ears and was as pale as he could be. He was scared, scared very bad.

TESTIMONY OF MARTHA M. LaFAVOR,
Plaintiff.

Direct Examination (cont'd.)

By Mr. McCUTCHEON:

This was in April 1919. I was still living in the same place, and he was still living in the same place. We were about fifty feet apart, the houses were. From late April 1919, he walked with a cane for two months. He did not do any work. He went for a little walk about ten o'clock—he came up to see me where I was working—I was waiting on table, in a restaurant. He came up one day at ten o'clock and stayed until eleven o'clock, had coffee and lunch. He said, "I guess I will go for a little walk, then I will go home"; and at two o'clock he

(Testimony of Martha M. LaFavor.)

came up there and met me and then we both walked together and he went and laid down to sleep and I went on home and done my ironing, washing or whatever I had to do. He used the cane for three months, May, June and July. Then he just laid around, go- [66] ing for a walk. His mother was sick. He did not go to work. I don't know whether he worked before he was married. I never saw him work. We were married March 28, 1920, at Scobey, Montana. From the time of his discharge, April 21, 1919, to March 28, 1920, he did not do any work; I never saw him do any working. I saw him every day. After we were married we lived in the same place until November 1st when he was called, October 14th, to Spokane for vocational training. From March 28, 1920 to October 1920, he worked from the first of March until the last of September, 1920—was helping in the flour mill sewing sacks. He was sitting down when he was sewing those sacks. I went to the flour mill with him and saw him work. I saw him sitting down sewing. He worked three hours a day, sometimes four. He went down there to work at eight o'clock and came home at ten o'clock; had a lunch, then went down again; came home and had dinner, then he came at two o'clock, came home again and had another lunch. I gave him the lunches. From March until September 1920 he averaged about three or four hours a day on that job. He did not work for a power company that I know of. He worked about four hours a day on the average.

(Testimony of Martha M. LaFavor.)

During that period when he was sewing sacks he did not do any work around the house because there was nothing to be done there. He laid down in the daytime, for an hour at a time. He would lie down after he had his little lunch. In September 1920 the government sent him to Spokane for taking training—vocational training. I did not go with him. At Spokane he went to high school; he had to take a smaller course; then they gave him a bookkeeping course, at Spokane. He was in Spokane from October 31st until March 1922. He was in Spokane from October 1920, all of [67] 1921, up to March 1922. He was drawing \$150.00 a month from the government then. I visited him while he was in Spokane; we lived there. We moved to Spokane on November 7, 1920. I did not go when he first went. I followed about a month later; he left on the 14th of October, I followed November 7th. He went to the Sacred Heart Hospital in July 1921. I was living in Spokane at that time. The government sent him to the Sacred Heart Hospital to have his tonsils taken out. He was there one week. Before he went to Sand Point he was not in the hospital any more but the nurse came out and saw him every month, came up to our home, while he was in Spokane taking vocational training. He went to Sand Point in March 1922. I did not go with him to Sand Point. I had to stay home; we had a small baby. We had two babies at that time. I heard from him at Sand Point. He was at Sand Point about two months. After he had been in Sand Point, Idaho two months he

(Testimony of Martha M. LaFavor.)

came home and was sick. When he came back from Sand Point, Idaho, he weighed about 135 pounds. After he came back from San Point, Idaho, he stayed home until the government could find him another place. That was about a month. Then he went to Moscow, Idaho. I went with him. At Moscow they gave him some more vocational training,—poultry. There was an experimental station down there. I remained in Moscow, Idaho until 1923, on the 20th of February. During the time we were living in Moscow, Idaho, and he was taking training at the experimental station, he went down there at nine o'clock in the morning and he came home at noon and then rested for two hours, laid down and then went back again until four o'clock and come home. He did not do any work at home. The nurse continued to visit him. At that time he was receiving \$105.00 compen- [68] sation for vocational training. We stayed there until February 1923. Then Mr. LaFavor and I moved to Colville, Washington. We lived in town for two months and in the meantime, while he was—the government told him to take a rest and look around and see if he couldn't find a place. So he found the little place of four acres; about four acres and we paid so much a month on it; there was a mortgage on it. The government sent him a wagon, a cutter, harrow, plow and harness. At that time when we moved on the little farm at Colville he weighed 127 pounds. At first the government nurse

(Testimony of Martha M. LaFavor.)

came out once a month; then she came out once every two months. We lived on the four acre ranch at Colville from 1923 to 1928. We have three children. At the time we were on the farm they were small babies. When we moved out the baby was only a month old. During those five years on the little farm near Colville, Washington, Mr. LaFavor did not do any work; I had to do the work. There was some plowing, some gardening work to be done. We had one cow, fifty chickens, one horse. I milked the cow, looked after the chickens, did the washing. He helped me with the children. During that five year period he did not work out for anybody else. He never worked for anybody else from the time I married him other than that job of sewing sacks. During the winters of 1924, 1925, 1926, 1927, 1928, while we were on the little ranch at Colville, my husband came to the Cushman Hospital every winter; spent the winter in the Cushman Hospital, for a period of three or four months. The second time, three months, then four, then two. This happened every year since 1924. When he came back from the trips to Cushman, at times he came back apparently improved in his physical appearance and health, and [69] at times he was worse. In 1927 when he came back, he came back with a cane. We sold the little place in 1928. We got \$600.00 for it,—\$400.00 for our equity. We came to Tacoma in 1928 direct from Colville. From 1928 to 1931 we lived on South

(Testimony of Martha M. LaFavor.)

Park Avenue; we rented from Mrs. Nehring, the lady who was on the stand. We rented for one year and then we rented from a man by the name of Dodd. We were still receiving compensation from the government—\$72.45. During that period my husband did not do any work. He was just doing something to keep his mind up; we lived in town; he was sitting down; and he only weighed 128 pounds then. He had lost weight. He weighed 128 pounds in 1929. He moved out to a little ranch on East 72d Street, where I now live. He moved out there July 7, 1931. That place consisted of nothing but a piece of raw land, ten acres. We paid \$15.00 a month for it. I don't know how much we paid down but the man we rented from, he knows. We made installment payments. There were no buildings on it. A building was not built on it. The house where I am now living, I did most of the building. My husband helped me a little. We hired Mr. Elliott to help us. Mr. Elliott helped. It is just a little shack, two little bedrooms. The little kitchen isn't finished yet. Mr. Sykes did some work on it. It isn't finished yet, no bathroom, no running water in the house. I did not acquire any stock or chickens out there, I haven't got anything. My husband started this case against the government in 1928. He died January 11, 1932. During the twelve years we were married, I never saw my husband do any heavy manual labor. During those twelve years he received compensation

(Testimony of Martha M. LaFavor.)

from the government. When he died it was \$72.45. I did not receive \$3,000.00 of in- [70] surance on the converted policy; I put in my claim. They would not let me have it until three weeks ago, I put my claim in; about two weeks ago, I put the claim in. I have been trying to get it ever since he died. During the periods when we were living in Scobey, Montana, and then in Spokane, my husband was there, and while we were in Moscow, and while we were on the farm in Colville, my husband manifested extreme anger towards me—he was worse in 1923 when it started. The first time was in 1923. We were then in Colville, Washington. The occasion was his rundown condition. He flew off the handle, quick, got excited. He abused me.

TESTIMONY OF E. C. WHITLEY,
for Plaintiffs

E. C. WHITLEY, an adverse witness, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination

By Mr. NEWMAN:

My name is E. C. Whitley. I am an attorney,—for the United States government. I have the service records of Charles LaFavor, deceased, in my custody. I have them in my custody now. That is the com-

(Testimony of E. C. Whitley.)

plete record of Mr. LaFavor's entire military service (hands documents to Mr. Newman).

Whereupon plaintiffs' exhibit #14, after being identified, was offered and admitted in evidence without objection.

Mr. NEWMAN: (Reads excerpts from exhibit #14.)

Mr. DeWOLFE: I would like to read briefly a few parts that were not read, in order to save time. Whereupon Mr. DeWolfe continues to read from plaintiffs' exhibit #14. [71]

TESTIMONY OF MARTHA M. LaFAVOR,
Plaintiff

Direct Examination (cont'd.)

By Mr. McCUTCHEON:

Yesterday at the time I left the stand I spoke about my husband having spells. They came on about two days before he got them. Two days before he got them he had an awful headache before the spells came. About two days before he got these spells he would have an awful headache and his mind was somewhere else, and he would go on talking to himself; it would take two or three days. I would say something to the children and he would fly right up, and he came and pulled my hair and hit my face and when he got over those spells he would lie down and sleep two or three hours.

(Testimony of Martha M. LaFavor.)

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,—

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said “Where did you get those bruises?” I said, “Don’t you know?” and he said he did not know.

Mr. DeWOLFE: I will object to that. There is no mental disability pleaded.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

He was just as nice as he could possibly be afterwards. That was along in 1923 until the last of September, 1931, he kept that up. [72]

He did not go to sleep the first part of the night. I had to rub his legs, I had to rub his back and his arms. I rubbed his back with wintergreen liniment. I rubbed him until he went to sleep, and then I went to sleep and all at once he was raving like he was in the war. And then he would say, “I must roll over on my left side”. And he would then say, “Gee, I had an awful fight”. And then the next morning he slept until ten o’clock, and then he got up and walked around. That started ever since he and I were married. While I was asleep I put my arm around him this way (indicating) and let my face to his back

(Testimony of Martha M. LaFavor.)

(indicating) and he said, "Don't lay your arm there". That started the first night we were sleeping together, when we were first married. I had a number of photographs. This one (plaintiffs' exhibit No. 1), he brought it to me, when he was discharged. My husband is the man there with his hand to his face.

Whereupon plaintiffs' exhibit No. 1, was offered and admitted in evidence over the objection of the defendant on the ground that it was not properly identified, and exception was noted.

(Plaintiffs' exhibit No. 2, a photograph, handed to witness.) He had it taken and he gave it to me,—before the war. I was not there when this picture was taken. He is the man with the saw,—no, that is his father. My husband is on that picture. That was 1910. I know him in the picture.

Whereupon plaintiffs' exhibit No. 2 was offered and admitted in evidence over the objection of the defendant on the ground that said exhibit is too remote and not within the issues in this case, and objection was noted. [73]

Mr. DeWOLFE: We will admit that the youngest man in the picture is her husband.

(Plaintiffs' exhibit No. 3, a photograph, handed to witness.) That is myself. That picture was taken on the four acre ranch. That is myself. The picture was taken in 1926.

Whereupon plaintiffs' exhibit No. 3 was offered and admitted in evidence over the objection of the

(Testimony of Martha M. LaFavor.)

defendant on the ground that said exhibit is immaterial and not a picture of Charles LaFavor, and exception was allowed.

(Plaintiffs' exhibit No. 4, a photograph, handed to witness.) That is my husband in 1931 at Lake Geneva. I took the picture.

Whereupon plaintiffs' exhibit No. 4, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 5, a photograph, handed to witness.) That is my husband and the children. It was taken in 1930. I took the picture.

Whereupon plaintiffs' exhibit No. 5, after being identified, was offered and admitted in evidence without objection.

That is my husband (pointing to plaintiffs' exhibit No. 6). It was taken on Armistice Day in 1919. I did not take the picture,—I was there.

Whereupon plaintiffs' exhibit No. 6, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 7, a photograph, handed to witness.) That was taken at Fort Lewis in 1917. It is my husband. [74]

Mr. WHITLEY: Did you take the picture?

The WITNESS: No.

Mr. WHITLEY: We object to it.

The COURT: The means of knowledge not being shown, the objection is sustained on the bare statement.

(Testimony of Martha M. LaFavor.)

Q. Did you recognize that photograph?

A. Yes.

Q. When did you receive it?

A. When he was at Fort Lewis.

Q. How did you receive it?

A. In the mail.

Q. The regular way?

A. Yes.

Q. Do you know his handwriting?

A. Yes.

Q. Was it addressed to you?

A. Yes, sir.

Mr. WHITLEY: Is that his handwriting on the back?

A. Yes.

Q. Where was this?

A. At Spokane.

Q. Spokane, Washington?

A. Yes, before he got so bad that I had to work,—

Mr. DeWOLFE: I will object to that, and will move that the answer of the witness be stricken.

The COURT: The Court will not undertake to separate the admissible parts from the inadmissible. So the entire answer will be stricken, and you are instructed to disregard it. [75]

(Plaintiffs' exhibit No. 10, a photograph, handed to witness.) I recognize my husband in that picture. I received it in 1917. He gave it to me in the early part of the spring, and I met him in May.

(Testimony of Martha M. LaFavor.)

Whereupon plaintiffs' exhibit No. 10, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 9, a photograph, handed to witness.) That was taken July 1, 1929 at Point Defiance Park. I took the picture. My little girl and the neighbor's baby, two months old, are in the picture. That is Mr. LaFavor there (pointing).

Whereupon plaintiffs' exhibit No. 9, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 19, a photograph, handed to witness.) That was taken at Spokane, Washington in 1921. I was not there. My husband is there—he is this one (indicating) with the "x" on it. He took that training there before he could take book-keeping.

Whereupon plaintiffs' exhibit No. 19, a photograph, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 18, a photograph, handed to witness.) That is my husband (pointing). That photograph was taken at the Northwestern Business College at Spokane, Washington. At that time he was being sent to school by the government.

Whereupon plaintiffs' exhibit No. 18, after being identified, was offered and admitted in evidence without objection. [76]

(Plaintiffs' exhibit No. 17 handed to witness—a photograph.) This is my husband and I. It was taken in 1920. That was when we were married.

(Testimony of Martha M. LaFavor.)

Whereupon plaintiffs' exhibit No. 17, after being identified, was offered and admitted in evidence without objection.

These spells that I spoke of, at the time when they first started, it was about two days a month, and once a month, and sometimes they went two months at a time. I was asking God to help him and I know that He answered my prayers, and all at once it would come up again. It just came on quickly. He just came home, when I was picking potatoes, and he started to speak to me, and I did not answer right away and he flared up, and how it started was the first time at Colville, Washington, in 1923. I was picking potatoes and it was a little distance up to the gate, and he went down town and came back. He came home by the gate there. I did not go to open the gate, because I thought it would be all right if he opened the gate. I was digging and picking potatoes. He came in and started to rave, and said, "Why didn't you come up and try to open the gate?" I said, "You are not doing anything; I am doing all the work. It won't hurt you any to open the gate". And then is when he pulled my hair, punched my face. That was the first time he ever laid his hands on me. He complained about his head all the time. He went and laid down. He would catch his head like this (indicating), when he had the headache. He complained about his head all the time. He took aspirin for his headache,—right along. Lots of times I forgot to take it out when I washed his clothes and they

(Testimony of Martha M. LaFavor.)

would be in the clothes. I would find a half box of [77] aspirin that I had washed up with the clothes. His headaches got worse since 1923. I saw him lose his balance and fall, that was in 1931. It was where I am living now. It was after he had had an examination at the Veterans Bureau Hospital. I think it was October 1st. At that time I was at home. He was at home. He had to go to the Veterans Bureau and have an examination. So he went down and had an examination in the morning. He came back home. He arrived home on October 1st about five or six o'clock at night. He said, "I don't want you to cook any supper. The Doctor gave me some powder, and I have to take that the last thing before I go to bed, and do the same thing in the morning, without anything to eat. He is going to give me a stomach test." He took the medicine and went to bed, and then went to Seattle. He lost his balance afterwards. The first day he left for Seattle, I saw him take the powders. He came back the next day. He did not eat anything the first night when he came back home. He did not eat any breakfast. The night before he ate a light supper. The second night after he came home he ate a light supper. He went to bed. The next morning he ate some breakfast. I saw him fall down two weeks afterwards. He was sitting in the chair, in the kitchen,—at eight o'clock in the morning. He said, "Gee, I don't feel good. I am awful weak. Get me some water", and I went after the pail to get him a drink, and he fell right flat on the floor.

(Testimony of Martha M. LaFavor.)

He fell forward, on the left side and cheek, and he laid there until I bathed his face with cold towels and I rubbed him and he came to, and he said "Help me up", and I helped him up. And he said, "I am going to the lavatory". I watched him and he came back in and he said, "I am awful weak". And I told [78] him he should lay down, and he got up and laid down. And all that day he was not able to walk.

Mr. DeWOLFE: I move that the last part of the answer be stricken. I will object to this line of testimony on the ground there is nothing in it within the issues, and on the further ground that this testimony is burdening the record.

The COURT: The statement that he was not able to walk will be stricken. Otherwise the objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed. That is, the objection made to the entire line of testimony is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I have observed my husband vomit,—just before he was eating in the morning. It started ever since I knew him, and he had to have a lunch at ten o'clock, and then a lunch at twelve o'clock and then a lunch at two o'clock. He could not eat very much at a time. It did not happen before the war. It was after he came back from the war. He vomited after he got through eating. He could not keep anything on his stomach. That did not occur every day,—two

(Testimony of Martha M. LaFavor.)

or three times during the month. After we were married our hours for eating that were not regular were ten o'clock and two o'clock. Before ten o'clock in the morning we had breakfast. He just ate a little bowl of mush. He would have something to eat again at ten o'clock, some coffee and light stuff. Then I served him again at lunch time, at noon. He ate a light lunch. At two o'clock he had a light lunch again. He never could eat heavily. That [79] is why he had to eat so often. At Colville I did the work. My husband died January 11, 1932. I was at his bedside when he died. He was able to talk up to the time he died. He had a heart attack. The first one occurred after he had had his examination at the Veterans Bureau. He had the last one in the evening as he was taking a bath. He was fainting, and he said, "Help me out". I helped him out and he said, "If I ever have another attack like this one, it will be the last of me". This was on January 11th when he died. On the evening of the 10th he was sitting at the table watching the boy washing his hair, and he went and washed the boy's hair. He had an attack that evening. When the children went to bed, he went to shave. That was above eight o'clock. At nine o'clock he was going to take his bath, and he started to wash his hair. He said, "I believe I have another spell coming on. I am going out." And he went out and came back and said "It seems like my bowels have stopped to move". He then said, "Fix me an enema", and I fixed him an enema and he kept walking the floor

(Testimony of Martha M. LaFavor.)

and holding his heart like this (indicating), and he said, "I can't walk any longer. I have to go and lay down". And he said, "Animals, when they get sick, they don't lay down, and I should not". And he said, "Take the windows out of the house so I can get some breath". I took the windows up and raised the pillows so he could breathe. That was at ten o'clock. That night he laid down and slept. All at once he said, "I can't stand it. It is choking me. Lay me down, and get some cold rags and put on my heart". And he said, "My arm is paining me so. Get some liniment and rub it". And I rubbed them and he lay down with eyes shut, and he said, "My arm is [80] paining me so". I said, "I will get the cold water bottle and put it on your chest while I get some cold rags and wring them". And when I came back he went like this (indicating): ah, ah, ah! He did that three times, and he raised straight out of bed. I was going to get the doctor and he said, "Don't, I will be all right". I said, "I am going to call for the doctor". I was with him all of that night until he was gone. That same evening at eleven thirty he lost consciousness. After he lost his breath he could not speak. He never spoke again. I assisted him in taking enemas,—he had trouble right along. The worst was since 1925, and from that time he always had to be massaged. I had to massage him.

Mr. DeWOLFE: The government will stipulate that the jurisdictional record of disagreement exists, and also that she is the qualified executrix.

(Testimony of Martha M. LaFavor.)

Mr. McCUTCHEON: Plaintiff's exhibit No. 20, is a certified copy of the Letters of Administration,—oh, counsel is waiving that.

The COURT: What date?

Mr. McCUTCHEON: November 28, 1932.

The COURT: Appointing this witness,—

Mr. McCUTCHEON: Appointing Mrs. LaFavor.

I am the regularly appointed administratrix of the estate, appointed by the Court. I still am,—it has never been revoked.

Whereupon plaintiffs' exhibit No. 20, after being identified, was offered and admitted in evidence without objection. [81]

The plaintiff, Martha M. LaFavor, testified as follows on

Cross Examination.

By Mr. DeWOLFE:

My husband originally had a ten thousand dollar policy of term insurance.

Q. And as far as you know he paid no premiums on that policy subsequent to his discharge from service?

Mr. McCUTCHEON: We admit that.

As far as I know he paid no premiums on that policy since the date of his discharge. My present dispute with the government is only on seven thousand dollars of that insurance. As to the other three thousand dollars, I am the beneficiary of two thousand dollars, and his mother of one thousand dollars,—he changed his mother to me. And then the three thousand dollars was converted. The three

(Testimony of Martha M. LaFavor.)

thousand dollar policy was in force until the first of February. My claim is for seven thousand dollars, that is, deducting the three thousand dollars which was later converted. Ever since 1932, I think it was in February, I have been negotiating with the government for payment of the three thousand dollars insurance.

Q. And the government has indicated that the three thousand dollars is in line for payment when the trouble between you and the mother is ironed out?

A. I was the beneficiary.

The government has not disputed liability on the three thousand dollars. My husband never did any work in Colville in 1928. In Colville he was getting \$105.00 compensation from the government. When he came back from Colville they deducted it to \$72.45. I don't remember the training [82] pay. He got \$105.00 compensation. That is my husband's signature there (indicating signature on government exhibit A-1). That is his signature on the top there.

Whereupon defendant's exhibit A-1, after being identified, was admitted in evidence, without objection.

The one dated April 29, that is his signature. That looks like my husband's signature and his handwriting.

(Mr. DeWolfe reads from defendant's exhibit A1).

In 1923, on April 29, 1923,—I was there at that time. According to my best judgment, that report

(Testimony of Martha M. LaFavor.)

is made out in his handwriting. He did some work. He had to do some to keep his mind up or he would go unbalanced. [83]

The report of May 19, 1923,—I never left. That is his handwriting. The body of the report looks like his handwriting. All these reports I have seen are in his handwriting.

Mr. Manning was the representative of the United States Veterans Bureau who supervised the trainees in this work. The report of January 26, 1924 looks like his handwriting. That is his signature on the back. [84]

Q. Now, skipping down to May 24, 1924, was this his handwriting again?

A. Yes. [86]

(Mrs. LaFavor handed defendant's exhibit A-2.) According to my best judgment that is Mr. LaFavor's signature.

Whereupon defendant's exhibit A-2, after being identified, was admitted in evidence, without objection.

(Defendant's exhibit A-2 read to the jury by Mr. DeWolfe.)

That is my husband's signature on government's exhibit A-3, on the back.

Whereupon defendant's exhibit A-3, after being identified, was admitted in evidence, without objection.

I was married March 28, 1920. I never saw him work before we were married.

(Testimony of Martha M. LaFavor.)

(Mr. DeWolfe reads Government's exhibit A-3 to the jury.)

He never worked in the power plant that I know of. Before we were married I never saw him work in the flour mill. I did not see him working. In January 1920 he went to the Northwestern Business College. He quit his employment in the flour mill at Scobey, Montana, December 20. He used to come home at night when he was working at the flour [87] mill. (Defendant's exhibit A-4 handed to witness.) That is my husband's signature.

Whereupon defendant's exhibit A-4, after being identified, was admitted in evidence, without objection.

(Defendant's exhibit A-4 read to jury by Mr. DeWolfe.)

My husband was sick about the fall of 1925. He was in the hospital. I think he went to the hospital on February 27th, 1925; he left February and he stayed until May. It was in 1925. From September to December, 1925, he went again; he was twice in the hospital in that year. He was in the hospital from September to December 1925, at Cushman. I remember that year he had to go twice. I don't remember exactly the number of months he was in the hospital. As to where he was in October, November and December, 1925, whether he was in the hospital or on the ranch at Colville, I don't remember. I had so much sickness I could not remember that. In 1925, I know, in the Spring, just what date it was. It was on February 27th and then he came

(Testimony of Martha M. LaFavor.)

home in the middle part of May and then in the Fall they sent for him to come into the hospital again. In the Fall he was in the hospital two or three months, or four months. I don't remember what date he went to the hospital. That was in 1925. It was in December if I remember right. Prior to that, September, October and November, he had stayed at home at Colville. I remember that now, 1925. His nephew was there at that time, September, October and November. His nephew did the work. For about three months prior to December 1925 the nephew and I did the work on the ranch, and prior to that three-months period my brother was doing it. My husband helped a little. (Defendant's exhibit A-5 handed to witness.) That is my signature, that is my letter. [88]

Whereupon defendant's exhibit A-5, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-5 to the jury.)

That is my husband's signature (indicating signature on defendant's exhibit A-6).

(Defendant's exhibit A-7 handed to witness.)

That is my husband's signature (indicating).

Whereupon defendant's exhibit A-6, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-6 to the jury.)

(Testimony of Martha M. LaFavor.)

Whereupon defendant's exhibit A-7, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-7 to the jury.)

Whereupon defendant's exhibit A-8, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-8 to the jury.)

Whereupon defendant's exhibit A-9, after being identified, was admitted in evidence, without objection.

I never saw him work. That is his signature (indicating signature on defendant's exhibit A-10).

Whereupon defendant's exhibit A-10, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-10 to the jury.) [89]

I do not remember that my husband had an adjusted compensation certificate. He had a certificate on which he borrowed money. I was paid on that \$600.00 after he died. Before he died he borrowed approximately that during his life, but not at one time. I recall Mr. LaFavor having worked at the flour mill at Scobey, Montana, after we were married. He started working at the flour mill March 1st, 1920. We were married March 28, 1920. He went to work several weeks before we were married,

(Testimony of Martha M. LaFavor.)

—he went to work in the flour mill. He continued working there until September. I don't remember what he got. I do not have any knowledge of his employment at a plant in April, 1919. At that time I saw him every day. He left Scobey, Montana, October 14, 1920 to go to the Northwestern Business College at Spokane, Washington, and he stayed there until about March, 1922, taking vocational training for the government. He received training pay during that time from the government. The government paid for his books and supplies at the school, at the business college. I think they paid for his education at the school. I don't remember if he paid for it. After he got out of the business college training he went on the McPherson Poultry ranch; that was at Sand Point, Idaho. He helped with baby chicks. I don't know how long he stayed with McPherson. He did not go from there right away. I think it was in August that he went to the University of Idaho; I don't remember the month, but it was that Fall, or the latter part of the summer. I know it was that Fall. In the summer of 1922 he took a rest. The government told him to take a rest in the meantime, and they were looking something up for him to do. He continued at the University of Idaho until 1923,—I think it was the [90] last of January. He left March 20th; the baby was one month old, and before he went to Colville. We had to take our trunks and move them. We went to Colville. The government paid his tuition at the Uni-

(Testimony of Martha M. LaFavor.)

versity of Idaho and I suppose the government supplied his books. He got training pay, too. It was in June, 1922 that the ranch was purchased at Colville, Washington. We had it before March, 1923. The government told him to look around and find a place. We moved onto the ranch in May. We left town. We lived in town two months. That was May, 1923. We stayed there until 1928. The government furnished a wagon, a harrow, plow—I think that was all. They gave him that to go on the place and work when he felt like it. They gave him practically everything. I know Mr. Bloom. He lived there. My husband never worked with him, neither on our house or any other place. In June, 1924 he was over on the ranch at Colville. I don't remember that he hurt himself at any time in 1924 with a sack of grain falling out of a loft; I don't remember that he hurt himself at any place in that vicinity during that year.

The plaintiff, Martha M. LaFavor, testified as follows on

Re-direct Examination

By Mr. McCUTCHEON:

I think he paid fifty dollars in 1922 when he got the place at Colville. I would say the monthly payments were fifteen dollars a month. (Plaintiffs' exhibit No. 21 handed to witness.) That is my husband. It was taken in Colville, Washington, in July, 1927. Those are my children (indicating). [91]

(Testimony of Earl C. Whitley.)

Whereupon plaintiffs' exhibit No. 21, after being identified, was offered and admitted in evidence, without objection.

EARL C. WHITLEY,

an adverse witness, having been recalled as a witness on behalf of plaintiffs, testified as follows on

Direct Examination

By Mr. McCUTCHEON:

I know R. L. Popwell. He is educational advisor of the United States Veterans Administration at Seattle, and he is now and has been such advisor since 1924, to my knowledge. (Plaintiffs' exhibit No. 23 handed to witness.) That is not his signature. I worked in the United States Veterans Bureau from 1925 to 1933. During that period I was familiar with the routine of the office. I do not know that signature. It is customary for someone in Popwell's office to sign his name. I would say that plaintiffs' exhibit No. 23 is a letter dated April 6, 1925, purporting to be sent by R. L. Popwell's office, Chief of the Claimant Division, from the office I was formerly in,—at Seattle. From this, I could not tell whether or not that was sent out in the regular course of the mail. That is his name that is signed to it. I do not know whether or not I have a copy of plaintiffs' exhibit No. 23 in my file. Plaintiffs' exhibit No. 24 is a letter dated February 15, 1927 from R. L. Popwell,

(Testimony of Earl C. Whitley.)

Chief of the Claimant's Division, Seattle, Regional Office, addressed to Mr. LaFavor. That is his signature.

Whereupon plaintiffs' exhibit No. 24, after being identified, was offered and admitted in evidence, without objection. [92]

That (plaintiffs' exhibit No. 25) is a letter dated March 13, 1926, addressed to Charles LaFavor, Colville, Washington, bearing the name of R. L. Popwell, but not his signature.

(Mr. McCutcheon reads plaintiffs' exhibit No. 24 to the jury.)

DEPOSITION OF JOHN M. GILBO,
witness on behalf of plaintiff, read to the jury,
as follows:

My name is John Martin Gilbo. I live at 4515 South Tacoma Avenue. I was in the military service during the World War. I was acquainted with Charles V. LaFavor. I met him at Demartin, France, in 1918, the latter part of August. The day I got acquainted with him he was not feeling very good. He was rubbing over the left part of his breast. I met him through the sergeant of Company A. He told me there was a man in Company A from the same place I was from. I was in the same regiment. In France I knew him between two and three weeks. Close to three weeks

(Deposition of John M. Gilbo.)

after I met him, I left. The next time I met him he was complaining about the pain in his breast. He mentioned about his left side. I first met him in Demartin in a little store near the company headquarters,—it was Sunday afternoon. He went to my company with me and we had dinner there. It was after he had eaten that he complained about feeling ill. Then he started back to his own company. The second time I saw him I met him near a little water hole. We were going in swimming but the hole was full of weeds. Then we went to the barracks. He said he did not want any lunch, he had some with him. So he stayed there while I ate. He mentioned he did not feel well on his left side but he did not mention his heart direct. I saw him about four times. [93] The next time I saw him was when I went through on a truck. I did not speak to him very much then. The next time I saw him was when we had a divisional meet. There was not much said. That was the fourth time. We just talked about the trip. The first time I met him he was glad to see me. He did not do much of anything. I did not see him again in France after we left there. The next time I saw him was in 1926, at the Cushman Hospital,—he was a lot more sickly and peaked. I notice a change in his appearance—he was a lot paler and thinner and was limping a little. I was there at Cushman Hospital most of 1926; he was there quite a few weeks while I was there. He mentioned his heart once at that time. He said he figured that his heart was on the

(Deposition of John M. Gilbo.)

bum at that time. At my first meeting with Mr. LaFavor in France, I do not know of anything unusual taking place.

John M. Gilbo testified as follows on

Cross Examination.

By Mr. WHITLEY:

The last time I saw Mr. LaFavor in France was when I was on the divisional hike with him. I was in Company B and he was in Company A. It was the divisional meet, the whole division. They said the hike was forty-one kilometers. I think a kilometer is five-eighths of an American mile. That would be about twenty-five miles, I think somewhere around that. That was the latter part of August, 1918, and I was discharged in April 1919. Just a month or so before the Armistice. That was the last time I saw Mr. LaFavor until 1926. That last time I saw him in France, some of them were in a bad fix. I could not say just how bad he [94] was. I do not know whether he went back with them or not. I went back on the truck. I do not know whether he went back with them. The last time I saw Mr. LaFavor was just shortly before he died, in 1932.

John M. Gilbo testified as follows on

Re-direct Examination.

By Mr. NEWMAN:

When I saw him in France, that was in August 1918, I could not state just the day.

EARL C. WHITLEY,

recalled as a witness on behalf of plaintiffs, testified as follows on

Direct Examination.

By Mr. McCUTCHEON:

I did not find a carbon copy of plaintiffs' exhibit No. 23 in the files. There are numerous files. It would take me sometime to go through them. R. L. P. represent Mr. Popwell's signature, whether he actually signed it or not. The other initials "J. I. N." represent the initials of the person dictating the letter. The other initials there represent the stenographer who wrote the letter. I can't recall anyone in the office with that initial "J. I. N.". "L. M. T." represents the stenographer who wrote the letter. There have been many stenographers there and that has been some time ago. I cannot say I know who L. M. T. is. The figures "C 15469" represent the claim number of Mr. LaFavor. If I had received that letter, my opinion would be that it probably came from the office I was formerly in.

Mr. McCUTCHEON: Plaintiff has filed a general denial of the defendant's answer.

The COURT: It may be filed. [95]

Whereupon plaintiffs rested at which time the following motion was interposed by the government:

Mr. DeWOLFE: The government moves for a non-suit on the grounds that the evidence of the plaintiffs has failed to make out a prima facie case

(Testimony of Earl C. Whitley.)

sufficient to warrant the submission of the issue to the jury; on the ground that the plaintiffs' evidence has not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance was in force and effect; and on the further ground that the evidence adduced affirmatively shows that during the time the insurance was in force and effect, he was not totally and permanently disabled. I would like to be heard for a moment upon the question.

Which motion was denied by the Court and exception noted on behalf of the government.

Whereupon the defendant proceeded with its case.

TESTIMONY OF B. F. WESTMORE,
for Defendant.

B. F. WESTMORE, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is B. F. Westmore. I am president of the Northwestern Business College at Spokane, Washington. I live in Spokane. I lived there about October 1920. As president I have custody of the records of that school. I have brought with me the records pertaining to one Charles V. LaFavor. (Defendant's exhibit A-12 handed to witness) That is the registration and attendance

(Testimony of B. F. Westmore.)

money paid in on account of Mr. LaFavor's tuition and grade,—that is the record. [96]

Whereupon defendant's exhibit A-12, after being identified, was admitted in evidence, without objection.

Mr. LaFavor started a course at my school October 27, 1920. He went to school until March 1922. He took up bookkeeping, and there are other subjects, too. He took set I and set II of bookkeeping, rapid calculation, commercial law, commercial English, commercial arithmetic and spelling. The following are the grades he received: In Set I of the bookkeeping, 92; Set II of Bookkeeping, 95; rapid calculation, 95; law, 93; English, an average of 94; commercial arithmetic, an average of 97; spelling, 92; and he also took writing, an average of 90; and rapid calculation 95. The absences are shown on four days in the first week in May. I cannot say positively what year. There were other absences totalling ten days,—the second week in May, and one the fourth week in May and one in the second week of April. He was going to school there the rest of the time as far as my records show. The government was paying for it. The government paid in all for that \$301.81. That was paid to this school, during the entire period.

B. F. Westmore testified as follows on

Cross Examination.

By Mr. McCUTCHEON:

I have no personal recollection of Charles F. LaFavor.

TESTIMONY OF HARVEY BLOOM,
for Defendant.

HARVEY BLOOM, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is Harvey Bloom. I live near Colville. [97] I knew Charles F. LaFavor. I first met him about 1923, after he moved out to the place near me. At that time he lived about a quarter of a mile from me. I first met him in the spring of the year, 1923. I saw him every day two. During that period of time I saw him plowing, working in the orchard, constructing some buildings. I saw cutting wood and hauling wood and I worked with him in the threshing. When he was plowing, I think he held the plow and his wife drove the horse. I cannot say that I have seen him plow all alone. He did carpenter work on his chicken house, and also on his house,—his dwelling house. I have seen him taking care of chickens. Mr. LaFavor and I had arrangements with regard to exchange of work. I went down and helped him two or three days on his house, and in return he was to help me out with a little pruning the next spring in my orchard. He was to show me how to do it. In one job we pitched bundles off the stack and into the machine, threshing,—both of us together. If I remember right, he got three hundred baby chickens in the first year. He had a horse, and cow or two, and some hogs. He milked the cows, I saw him milking the

(Testimony of Harvey Bloom.)

cows, and taking them to and from the pasture. I saw him from 1923 until 1928. He never looked pale to me. I never saw him limp and I never saw him use a cane. I never saw him fall down. I never saw him sick. I never heard him complain of physical disability.

Harvey Bloom testified as follows on

Cross Examination.

By Mr. McCUTCHEON:

My name is Bloom. I am a farmer, near Colville. My farm consists of forty acres. I have been there since [98] 1921. I know where the LaFavor ranch was. It was four acres. Not all of it was cleared,—a part of it was. I think about one-third of it was cleared, possibly an acre and a half. As to the rest of it,—the road takes up a part of it. There is a piece lying out in the open, and there was a hillside that was not cleared. The part that was not cleared was a portion of the hillside. When the LaFavors came there, there was a shack on it, I believe. I think it was a one-room board house. That was the way it was when they purchased it. I think he built a chicken house; until they got the other house built, they occupied the chicken house. For about three days I helped build the other house. I put the rafters and sheeting on, and put up the side. I think a neighbor helped him for a day or two. The house finally built was a three room house, one story. It did not have any water, no plumbing or bath. On that acre and a half he grew a variety of vegetables. There was

(Testimony of Harvey Bloom.)

an orchard on a part of it, possibly twenty-five trees. His agreement was that he would show me how to do the pruning. He came and did a part of it. They did not get water from me. He had some hogs. I do not know exactly how many. I would say that he had two cows. He got three hundred baby chicks the following spring. That was in 1924. I think he got the chickens in 1924. I do not know how many chickens he raised. I do not know if he increased the number or not. Sometimes I saw him every day or two, for about five years. I did not see him every week of the year; he was away at different times. I do not know how long at a time he was away. When he was around home I saw him every day or two. He was not around home when he went to the hospital a time or two. It may have been three or four times; it could have [99] been five times, I do not know. I saw him cutting wood. It was average timber that was down. We call them small trees, fir and tamarack. Just in passing, as I remember, I would see him cutting wood, just a little of the time. While he was cutting wood, I stopped and talked to him a couple of times. I did not write to the government and tell them he was cutting wood over there and asked them to investigate his compensation. I did not write to the government. I did not shut off his water. I did not have any difficulty with LaFavor. I was on the best of terms with him all the time. We never had a word about the water. The only words that we ever had were just in regard to a breachy animal,—a young cow. The cow crept through

(Testimony of Harvey Bloom.)

the fence and got into my alfalfa. I just asked him to do something about it. That was all that was done or said. I did not lock the cow up. I do not know whether my wife wrote to the government or not. The cow got through the fence in the summer when the alfalfa was growing, the summer of 1927 I think. The government sent a man to see me in this case. I don't know how they happened to send a man to see me. They sent a man to see me in 1929 or 1930. He talked to me about this case. Mr. Barr was a neighbor of the LaFavors over there. Mr. Flint is dead now. Mr. Flint lived about a mile away from the LaFavors. I think at that time Mr. Barr lived about two miles from the LaFavors. Mr. John Carlyle lived there, about three miles from the LaFavors, in town. I do not know if the investigator came to see him. I don't think I gave the government investigator a long report.

Harvey Bloom testified as follows on

Redirect Examination. [100]

By Mr. DeWOLFE:

I did not solicit this man to come to see me. His name was Mr. Schlax, the field investigator. The incident I spoke of about the cow has not caused me to change any of the facts in the case.

Harvey Bloom testified as follows on

Recross Examination.

By Mr. McCUTCHEON:

Mr. Fortune was also a neighbor. He lived about a quarter of a mile from the LaFavors. Also Mr.

(Testimony of James J. Mellinger.)

Fay, about a mile. The Stankeys were also neighbors; they lived about half a mile away. That is about all the neighbors around there.

TESTIMONY OF JAMES J. MELLINGER,
for Defendant.

JAMES J. MELLINGER, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY:

My name is James J. Mellinger. I am secretary of the Mellinger funeral parlor. I have custody of the records. I have the records concerning the funeral and burial of Charles V. LaFavor in January 1932. I have our sales sheet and our call sheet. (Defendant's exhibit A-13 handed to witness) We have a call sheet we make in getting the information of the deceased, and necessary material for the certificate of death, which must be gotten shortly. This is an original record, made in the ordinary course of business. Mr. L. L. Miller made that particular one. He was authorized at that time to make them.

Whereupon defendant's exhibit A-13, after being identified, was admitted in evidence, without objection [101]

(Defendant's exhibit A-14 handed to witness.)

When we receive a call, we have a regular set form, getting the name and the time of death and

(Testimony of James J. Mellinger.)

the residence where the person passes away; also the date of birth, where he last worked, what his occupation was, his birth place, the birthplace of his father, the maiden name of his mother, the full name of his wife and children, church affiliations of the deceased, former residence, and cause of death, and so forth. That is an original record. Mr. Thompson made it; he works for us. It was made in the general course of business. Defendant's exhibit A-13, that is an original record. From my own knowledge the entries were made between the 11th and 14th of January. The entry of January 13, 1932 was put on today. I made that entry myself. That is my own handwriting. I was connected with the firm in January 1932. I would not swear to it that an autopsy was performed at the undertaking parlors. All the entries, except the last entry which was made today, were made at the time of the transaction. I did not talk to Dr. Steele about this case today or yesterday with reference to autopsy.

Mr. WHITLEY: I would like to at this time publish and read the deposition of George Johnson.

The COURT: Let it be read.

Mr. WHITLEY: The deposition was taken on notice, if Your Honor please.

The COURT: This deposition was taken where?

Mr. WHITLEY: At Scobey, Montana.

DEPOSITION OF GEORGE W. JOHNSON,
witness on behalf of defendant, read to the jury, as
follows:

My name is George W. Johnson. I am a policeman. [102] I am forty years of age. I was acquainted with Charles V. LaFavor when he resided at Scobey. I met him I think in 1917 and then after the war when I came back I was personally acquainted with him. The first I remember seeing him was—I returned in March and I saw him in May, in the early part of 1919. After that I was acquainted with him for a couple of years before he left and I even heard of him after he left. Mr. LaFavor was working during the spring and summer of 1919. He worked in the mill. I am familiar with the mill and know what they do,—carry sacks and load wagons. Some of the sacks weigh around a hundred pounds. I would say that this work required a great deal of physical exertion. He complained of it at different times. I do not know the approximate dates he worked there—it was during the summer of 1919. I could not say for how long—it was for a number of months, I believe. He worked at the electric light plant. I believe it was after he worked at the mill; it might have been before. I am familiar with the type of work he did,—fireman. The fireman shoveled coal into the furnace. They had three shifts—eight hours a shift. Shoveling coal is hard work. I know he was idle part of the time but I don't know what for. I think they paid a hundred or a hundred twenty-five at the light plant. I know they did later but I don't know if they did then. I

(Deposition of W. B. Heppner.)

have no knowledge as to the amount paid by the Smith-Tyner Mill.

Mr. WHITLEY: I would like to read the deposition of W. B. Heppner. [103]

DEPOSITION OF W. B. HEPPNER,

witness on behalf of defendant, read to the jury, as follows:

My name is W. B. Heppner. I was acquainted with Charles V. LaFavor in 1919 and 1920. I just got acquainted with him in the spring of 1919. I saw him working at the flour mill. It must have been in July or the last of June, 1919. As far as I know he worked there about a year,—that would make it sometime in 1920. At the time I saw him, I was just there once, he was sacking flour. He was filling sacks with flour. He had a regular sack filler and the flour came through a chute into the sack. I did not observe whether or not it was necessary for him to handle the sacks of flour. I did not see that. That was the only time I saw him working. A friend of mine and I went down there. I did not know he was working at the mill but I met him there and he was working. Then, of course, I was working out of town and did not come in very often, and I did not see him until sometime next winter. Then I did not pay much attention whether he was working or not. I did not have any conversation with Mr. LaFavor relative to his work. I reside at Scobey. I am a

(Deposition of Paul Crum.)

carpenter. I am thirty-nine years of age.

Mr. WHITLEY: I would like to read the deposition of Paul Crum.

DEPOSITION OF PAUL CRUM,

witness on behalf of defendant, read to the jury, as follows:

My name is Paul Crum. I reside at Scobey, Montana. I am a lawyer. I am forty-nine years of age. At the time Charles V. LaFavor resided at Scobey, I was acquainted with him. I knew him since the early summer of 1919 to the fall of 1920, or I might have known him prior to that time but I don't remember definitely. I was not associated with him [104] in any line of work. I was acquainted with the type of work that Mr. LaFavor was doing at that time. I know he worked as fireman in the Scobey Electric Light Plant in the summer of 1919 and that during part of 1919 and 1920 he worked in the shipping room of the Smith-Tyner Milling Company. I saw Mr. LaFavor working at the electric light plant during the summer of 1919. At that time he was firing and stoking the steam boiler in the Scobey light plant. He shoveled lignite coal into the furnace. The work which he was doing was the type of work that would be considered as manual labor, and required physical exertion. I do not know whether or not he worked continually during all that period of time. At the Smith-Tyner Milling Company he worked in the shipping room and handled

(Deposition of Paul Crum.)

sacks of flour and wheat and delivered to the customers. The sacks of flour weighed forty-eight and ninety-eight pounds, I believe. I do not know whether he worked continually all that entire time. I do not know whether he laid off from work any part of the time. I have not seen Mr. LaFavor since the latter part of 1920 at any time.

Mr. WHITLEY: The next is the deposition of L. C. McPherson.

DEPOSITION OF L. C. McPHERSON,
witness on behalf of defendant, read to the jury,
as follows:

My name is L. C. McPherson. I reside at Post Falls, Idaho. I have lived there approximately two and one-half years. Previously I resided for two years at Greenacres, Washington, and nineteen years at Sagle, Idaho. I resided at Sagle, Idaho from 1906 to 1925. I am a farmer by occupation. I conducted a farm at Sagle, Idaho. I knew a man by the name of Charles V. LaFavor. I knew Mr. LaFavor at Sagle, Idaho, in about 1922. At that time he was placed by [105] the Veterans Bureau on my farm to learn what he could about keeping poultry. He worked for me in that capacity for approximately three months, from about February 1 to May 15, 1922. During the time he was employed at my farm I had occasion to observe him at his work. I worked

(Deposition of L. C. McPherson.)

with him. He was to help in the care and feeding of the poultry and also in the hatching of baby chicks. The manual labor consisted of carrying feed from the feed room to the several coops and cleaning the litter from the coops from time to time and cleaning out the droppings every morning. In the carrying of the food to the coops, approximately thirty to forty pounds were required to be carried,—that is of feed. He was required to carry that feed from fifty to one hundred and fifty feet. It was level ground until he came to the door of the poultry house. There was a six foot stairs to go up. When he first came for the first four or five weeks, he assisted me with the dairy work. That consisted of milking about six cows and carrying the milk to the separator room. Mr. LaFavor milked six cows. He carried the milk about three hundred feet to the separator room, in a large can. He took hold of one side of the can and I the other. This dairy work only continued for about four or five weeks. Spare time was given to helping in the incubator room. In the incubator room, I do not think he was required to do any lifting or carrying of articles, in the performance of his duties. His duties, as a whole, required a good deal of walking and remaining on his feet during the day. The hours he was required to keep with regard to going to work and quitting work were approximately twelve hours. That required his attention every day of the week. He was required to go to work about seven o'clock in [106] the morning

(Deposition of L. C. McPherson.)

and he quit between seven and eight in the evening. During the time he was employed in these various duties I had opportunity to observe his demeanor physically. During that period of time he complained of disability,—he complained of his lungs a good deal. He told me about being gassed in the war, in the service, and he attributed it to that condition. He performed his work and duties satisfactorily when in my employ. At the time he left his duties at my place he left at my request. It was not because his work was unsatisfactory. Mr. LaFavor was satisfactory when in my employ. And his leaving was not by reason of any physical disability in that capacity. For his work, Mr. LaFavor I believe was drawing regularly, monthly, from the government, one hundred and forty dollars. He was not paid anything in addition to that by myself. I do not remember that he limped or had a lameness in either of his legs. If he had been noticeably lame, I would have had opportunity to observe that. He appeared to have a cough or lung difficulty. I would say it was mild. In my observation of him, his coughing or his lung trouble did not interfere with the nature of his work. From my observations of him, his work was entirely satisfactory. During this period of employment from the first of February, 1922 until the fifteenth of May, Mr. LaFavor did not have occasion to be off his work because of sickness. Every second Saturday, under agreement, he had the privilege of going to Spokane to see his family. Dur-

(Deposition of L. C. McPherson.)

ing his employment, each second Sunday, he was not in full charge of the farm. As to the nature of Mr. LaFavor's recreation during his employment, he would go to his room and read a good deal. To my knowledge, he did not indulge in any recreations that [107] would take him out of doors. About thirty days after he came to my place he had medical attention,—by a government nurse. If I remember correctly it was to test his lungs and his general condition. I do not think it was done by a doctor.

Mr. WHITLEY: The deposition of Mrs. L. C. McPherson.

DEPOSITION OF MRS. L. C. McPHERSON,
witness on behalf of defendant, read to the jury, as follows:

My name is Mrs. L. C. McPherson. I was sworn yesterday. I am the wife of Mr. L. C. McPherson. I reside at Post Falls. I did reside at Sagle, Idaho, in 1922. I knew a man by the name of Charles LaFavor, at Sagle, Idaho. He was placed with us by the Veterans Bureau for the purpose of gaining what knowledge we could give him of the poultry business. I would say he was employed on our farm approximately early February and sometime in May, 1922. During that period of time I had occasion to observe Mr. LaFavor in his duties. He was required to help in the general care and feeding of the poultry and the general care of the incubators and chicks, baby chicks. He worked approximately about

(Deposition of Mrs. L. C. McPherson.)

twelve hours, but not continuously during that time, but that was the time it would take to take care of the poultry. At first I think he helped with the dairy work. The dairy work consisted of helping milk the cows and bringing the milk to the separator house. I had occasion to observe him in the manual labor of that work. I observed him help carry in the milk. He was required to carry that about three hundred feet. It would usually be a ten gallon can and whether that can was full or not, I could not say, and the ten gallon can weighs [108] eighty pounds. From casual appearance, I would say I did not observe any physical disability. I had occasion to observe him in his walking upon many occasions. He complained of his lungs. At times he seemed to have an appearance of being easily fatigued. I wouldn't say he had a very noticeable cough. He had little red marks or spots around his eyes. During his employment upon our farm he was not absent from his work because of sickness at any time. His employment was regular every day in the week. He was receiving compensation from the Veterans Bureau. He was not paid anything in addition to that by myself or Mr. McPherson. He was to help us for the knowledge we could give him in return. I know the reason of his leaving our employment. It was not by reason of his health. As far as I know his work was very satisfactory. As to his recreation habits after work hours,—I would say they consisted of resting and

(Deposition of Mrs. L. C. McPherson.)

reading about the house. To my knowledge he did not take part in any athletic games, fishing, hunting, or any of those recreations. During the time he was employed on our farm, I do not have any recollection of his having a doctor visit him for medical reasons. He was employed regularly every day of the week during his employment by us. He went to Spokane to see his family on Saturday every two weeks and returned on Monday. He walked to and from the station to Sagle, and then he took the train into Spokane. He was required to walk about three-quarters of a mile. He carried his suit case. He took these trips which required this three-quarter mile walk every two weeks, for the three months that he was employed.

Mr. WHITLEY: The deposition of Ella L. Olesen. [109]

DEPOSITION OF ELLA L. OLESEN,
witness on behalf of defendant, read to the jury,
as follows:

My name is Ella L. Olesen. I reside in Moscow. I am the registrar of the University of Idaho. I have been in charge of the office of registrar since October 1, 1920. As registrar of the University of Idaho I am the custodian of the records of the University of Idaho that have to do with the attendance of the various students and the grades that they are given in the various subjects for which

(Deposition of Ella L. Olesen.)

they are registered. I have the summarized records of attendance of Charles V. LaFavor. The records that I have produced here pursuant to my subpoena and marked, for the purposes of identification, defendant's exhibits A, B, and C, are the only records of the University of Idaho with respect to the attendance and grades in the various subjects of Charles V. LaFavor,—the only records which have been sent to the registrar's office, and would be the only records kept by the University of Idaho with respect to his attendance and his grades. There are no other records other than those I have marked A, B, and C, for the purposes of identification, having to do with the attendance matriculation, absences and grades of Charles V. LaFavor. Exhibit A contains Mr. LaFavor's matriculation card showing that he was admitted to the University of Idaho as a special student on June 26, 1922; and the registration card for the 1922 summer session which shows that he was a rehabilitation student taking work in poultry and horticulture; and the class cards for these two subjects which show that he completed a course in horticulture on September 5, 1922 with a grade of B under Ernest Tolbert and that he completed poultry with a grade of A. [110] These are the official records with respect to the attendance and the courses taken and the grades obtained of which I am the custodian. (Defendant's exhibit A offered in evidence.) This (defendant's Exhibit B) is Mr. LaFavor's regis-

(Deposition of Ella L. Olesen.)

tration card for the first semester of 1922-23 showing that he was a rehabilitation student taking vocational courses in Poultry Husbandry, Horticulture and English and also that he was registered for Principles of Economics, a regular college subject; his transfer or attendance record for the first semester of 1922-23 showing that he received grades of A in Poultry Husbandry at the six and twelve week periods; and a grade of C at the six week period and B at the twelve week period in Horticulture. This card also shows his attendance record in Economics I and indicates that between September 26, 1922 and November 20, 1922, Mr. LaFavor had incurred fifteen absences. The course met three times per week. The grade cards which were filed at the end of the semester showing that he had a semester grade of B in Horticulture and an F in Economics. There are no class cards in Poultry and English. Covering the period from September 18, 1922 to January 30, 1923, inclusive, defendant's exhibit B, so marked for the purpose of identification, is the official record of the University of Idaho with respect to the attendance, grades and subjects taken by Charles V. LaFavor. (Defendant's exhibit B is offered in evidence.) Defendant's exhibit C, so marked for the purpose of identification, consists of Mr. LaFavor's registration card for the second semester of 1922-23 showing again that he was a rehabilitation student of the University of Idaho, and that he was

(Deposition of Ella L. Olesen.)

registered for courses in [111] Poultry Husbandry and Horticulture. Apparently he had added to his study list a course in Farm Water Systems and Sanitation on March 1, 1923; also the class cards for the three classes above mentioned. These show that Mr. LaFavor withdrew from the University before the end of the semester and received a mark of W as the withdrawal grade in all of his courses. Also the attendance record for the second semester of 1922-23 and the indefinite leave of absence which was made out for him on April 4, 1923, showing that he had withdrawn irregularly on March 21st. By irregular withdrawal we mean withdrawal from the University without the student filing a petition for indefinite leave of absence which he has received from his dean on his own initiative. Defendant's exhibit C is the official record of the University of Idaho showing the attendance, course of study taken, and grades given to Charles V. LaFavor during the period of February 5th to March 21, 1923. (Defendant's exhibit C is offered in evidence.) Defendant's exhibits A, B, and C are all the records of the University of Idaho with respect to the attendance, subjects taken and grades received by Charles V. LaFavor during the period from June 26, 1922 to March 21, 1923, inclusive. It would appear that Charles Victor LaFavor and Charles V. LaFavor are one and the same person. There are no other records of the University of Idaho with respect to the attendance and courses

(Deposition of Ella L. Olesen.)

taken and grades received by Charles V. LaFavor of which I am official custodian other than the official records I have produced here and which have been marked A, B and C for the purpose of identification. Charles V. LaFavor was a regularly enrolled student at the University [112] of Idaho,—as a vocational rehabilitation student. I have attendance records of Charles V. LaFavor or Charles Victor LaFavor in only those subjects taught by University of Idaho instructors which offer college credit. For the period from February 5, 1923 to March 21, 1923 I have the attendance record for the subject of horticulture, as appearing in defendant's exhibit C. During the period from September 18, 1922 to February 4, 1923, I have the transfer card which I mentioned before which shows absences in Economics I, and which is defendant's exhibit B. During the first period that Charles V. LaFavor was in attendance at the University of Idaho, being that period covered by defendant's exhibit A, no attendance record was kept for any subject. The grade A is interpreted as having a numerical equivalent of 90-100, B 80-89, C 70-79, D 60-69, E 50-59 and F below 50, under the scale then used at the University of Idaho. I should say the grade of B indicates about 86-89 as to numerical standing. A is the highest grade given at the University of Idaho. From defendant's exhibits A, B and C, I should say that Charles V. LaFavor was in attendance as a vocational student at the Uni-

(Deposition of Ella L. Olesen.)

University of Idaho from June 26, 1922 to March 21, 1923.

Whereupon defendant's exhibit A-15, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-16, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-17, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-18, after being identified, was admitted in evidence, without objection. [113]

Whereupon defendant's exhibits A-19, A-20, A-21, A-22, A-23, A-24 and A-25, after being identified, were admitted in evidence, without objection.

(Defendant's exhibit A-19, A-20, A-22, A-23, A-24 and A-25 read to the jury by Mr. Whitley.)

Mr. McCUTCHEON: We will stipulate that all of these may be admitted. The plaintiff will ask that they be held so that we can offer them in rebuttal.

The COURT: Any objection.

Mr. WHITLEY: No objection.

TESTIMONY OF GEORGE E. PFEIFFER,
for Defendant.

GEORGE E. PFEIFFER, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is George E. Pfeiffer. I am a physician and surgeon. I received my medical training at the Chicago Medical School, 1910. I received a degree of M. D. in 1910. I am now employed by the United States Veterans Administration, Portland, Oregon. I am a specialist in general surgery and have practiced general surgery for the last fourteen or fifteen years. I am a Fellow of the American College of Surgeons, a member of the Medical Societe, and Chief of the Surgical Service of the United States Veterans Hospital at Portland, Oregon. I am now located at Portland, Oregon. I am Chief of the Surgical Service. Surgery is my specialty. I examined Charles V. LaFavor, generally speaking, about twice a year, beginning in December 1925, going on through, I believe, it was March, in the spring of 1926; the winter of 1926; along about the spring of 1927; and [114] there may be one or two more, I am not sure. The first clinical examination, that is the examination of the patient, was in December 1925. I had x-rays before that. I made a reading of the x-rays in March of that year. I presume those plates were destroyed as having been too old, as having passed the storage limit for x-ray films in the

(Testimony of George E. Pfeiffer.)

United States Veterans Bureau. I believe the storage limit is two years. They were x-rays taken of the spine and pelvis. They were negative for any pathology.

George E. Pfeiffer testified as follows on

Cross Examination.

By Mr. NEWMAN:

I did not personally take these x-ray pictures. I don't think I was present when they were taken. It is customary in the hospital of that type, for technicians to actually take the x-rays; during the time they are taking them, they identify the films by certain numbers. The doctors who interpret those films depend on the proper placing of the numbers and proper keeping of the record for the identification of the particular films, he is reading; in other words, he depends on the technician's integrity and ability to properly record the thing, or that film,—the particular one relating to that particular patient. That is the only way we have of identifying the film with the patient.

George E. Pfeiffer testified as follows on

Redirect Examination.

By Mr. WOLFE:

That picture was taken at the United States Veterans Hospital, Tacoma, Washington, in 1925. [115]

(Testimony of George E. Pfeiffer.)

George E. Pfeiffer testified as follows on

Cross Examination (contd)

By Mr. NEWMAN:

I do not know of my personal knowledge that that was the picture of Charles LaFavor except that it had the number stamped on it,—it was the number given of that patient when the picture was taken. I was able to tell from the picture in what position the patient was placed when these pictures were taken.

George E. Pfeiffer testified as follows on

Direct Examination (contd)

By Mr. DeWOLFE:

There was nothing in the x-rays to indicate diseased changes of the bones in the particular parts x-rayed, the spine, right shoulder and hips. As I recall it, the parts x-rayed were the spine, right shoulder and hips. I examined him personally in December 1925. I examined him again in 1926, March 1926. I examined him in 1927, twice I think in 1927. He complained generally,—pain in the back, pain on motion, aching in the back, pain in the shoulders and hips, especially during movement. I diagnosed my finding on the examination of December 1925 as early hypertrophic arthritis. In other words, rheumatism, in which bone changes were occurring, new bone was being deposited—lime and salts were being deposited in the ligaments around the bone. There was nothing in the findings

(Testimony of George E. Pfeiffer.)

at the time I examined him that would enable me to say he could not work. I interpreted that x-ray in March of 1925. In my examination in December 1925, I found there were changes indicating the man had a productive arthritis, which I did not find in the x-ray in March 1925. The x-ray changes [116] came into existence since March 1925. The x-ray changes, however, are usually preceded by clinical changes; the x-rays can only show changes in shadows; those changes usually occur somewhat later than the onset of the disease, perhaps a year or so, or over a year. I think my next examination took place in March 1926. At that time I again found the man was suffering from moderately early hypertrophic arthritis, somewhat worse than the condition found in December. By moderately I mean the x-ray findings suggested that the condition was not more than,—I will say, arbitrarily, a year or two old. The striking feature of the examination made, in my opinion, was the progression noted from time to time; I saw this man from December 1925 through the next few years. The next examination was either in December 1926 or the following spring, I am not sure. At that time my findings showed the man was decidedly worse; his rheumatism was getting worse. I characterized it as progressive arthritis. The patient had several focal infections, as we term them, infections involving the teeth, tonsils and the prostate gland, which warranted an opinion that his rheumatism had resulted from such foci of infection.

(Testimony of George E. Pfeiffer.)

There was no evidence of trauma or injury at the time I examined him.

George E. Pfeiffer testified as follows on

Cross Examination (cont'd)

By Mr. NEWMAN:

By productive arthritis I mean arthritis characterized by the production of new bone, deposition of calcium salts in the ligaments around the bones. The first time I examined this patient was in 1925. In my opinion [117] this productive arthritis had existed not over a year or two, then; that is, so far as the productive changes were concerned; in fact, there was no evidence of productive changes in March of 1925. I think the x-rays of December, 1925 showed symptoms of changes; December, I think, not in March. Once these bones became infected so that the symptoms are shown on the x-ray, the man could not recover so that in future years these symptoms would not show on the x-ray. The x-ray would continue to show signs of arthritis; he would recover clinically. Changes characteristic of the disease are shown in the x-rays through the years, later on. The changes are there; they don't disappear; the deposition of salts in the ligaments, productive changes in the bones are permanent, naturally, unless removed surgically. If there had been symptoms shown by x-rays years before, it should have shown in 1925. I made a special examination, an examination confined chiefly to the orthopedic condition complained of;

(Testimony of George E. Pfeiffer.)

however, in making such examination, it is customary to survey the patient generally; he complained of so many things that it was quite obvious he was of an unstable makeup; in other words, it was difficult to correctly evaluate his complaints, made it difficult to decide as to how much weight to attach to some of his complaints with reference to his orthopedic disability. I did not examine his heart and lungs. I just made a general survey, sized him up as he walked and went through the various exercises he was requested to go through. Nature has nothing to do with that,—arthritis of the lumbar, of the sacroiliac, that is, providing a way of compensation by taking the weight of the side affected and causing a curvature of the spine. If he has pain, that side tilts to the other [118] side. The patient relieves the weight on the affected side; he tilts the pelvis upward on that side and in that way produces some curvature of the spine which is of a temporary character, however. As to the length of time it takes to develop that curvature, just the moment the patient relieves his weight on that side, elevates the spine—At that time I did not find any curvature of the spine in the x-ray. It would depend entirely upon the way the patient placed himself on the side,—if he drew up one side of the pelvis, he could produce a curve in the spine. In my examination of the patient I took into consideration his past history. As I recall it, I am not sure of the details, the history he gave me was essentially the history I heard given here yesterday, as having been gassed in the service

(Testimony of George E. Pfeiffer.)

and having been shellshocked or things of that sort and the history of the gradual onset of the pain in his back and inability to use his hips and shoulders as well as he wanted to; the history of sore throat. I think he had a history of having been told he had scarlet fever. He gave a history of sore throat; I am not sure whether he knew it was diphtheria or not. He gave a history of having been told he had had pleurisy. He said he inhaled gas. I do not recall that he gave a history of being knocked out by a high explosive shell; he said shellshocked, something of that sort. He said he had pyorrhea. I don't recall having given me a history of having had flu. As to his giving me his hospital record while in the service, no such facts as that are contained in the clinical records in the hospital in which the patient was at that time, which records were submitted to me at the time of my examination. [119] All those things are taken into consideration, that is in diagnosing the condition of the patient. Scarlet fever, diphtheria, are infectious diseases; there is some question so far as flu is concerned in so far as no one seems to know what causes it. An arthritis occurring in 1925 has nothing to do with infectious diseases occurring ten or twelve years prior.

Q. If it were possible that the record showed that arthritis existed a few months after his discharge from the service—?

Mr. WHITLEY: (Interrupting) We object to that.

(Testimony of George E. Pfeiffer.)

The COURT: Objection overruled.

Q. Isn't it probable that that would have been caused by one of these infectious diseases?

Mr. DeWOLFE: For the purpose of the record, we object on the ground it is without foundation.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I should have to say that an arthritis existing a few months after his discharge from the service might be based upon any one or all of such infectious diseases. However, it is a rather general statement. You named three or four diseases, which might have produced an arthritis. That is rather far fetched to say any one of those infectious diseases might have caused hypertrophic arthritis. It would be very, very difficult to prove medically. One of the recognized causes of hypertrophic arthritis is foci of infection. Focus infection is entirely different from the infectious diseases of the type you are discussing; focus infection means simply there is an area of infection [120] somewhere in the body, commonly likened to tonsilitis, pyorrhea, prostatitis, infected gall bladder; an infectious disease, such as you were discussing is a disease, characterized by a more or less short course and complete recovery.

(Testimony of George E. Pfeiffer.)

George E. Pfeiffer testified as follows on

Redirect Examination

By Mr. DeWOLFE:

There are two types of curvature commonly recognized. One is a functional type in which the curvature is not dependent upon bone or ligament changes; merely dependent on the ability of the spine to bend. The mere fact a photograph was taken at the time it was bent, would not mean he could not straighten his spine. The second type depends on actual changes in the spine, such type of curvature does not change. The type seen in the hunchback for instance, who has a type of curvature that does not change, except by surgical operation or something of that sort.

TESTIMONY OF B. A. SEIBERT,
for Defendant.

B. A. SEIBERT, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination

By Mr. DeWOLFE:

My name is B. A. Seibert. I am a physician. I was formerly with the Veterans Administration. I am now on furlough. I am a graduate of Barnes University, 1909, from which I obtained the degree

(Testimony of B. A. Seibert.)

of doctor of medicine. I am licensed to practice medicine in the State of Washington. I have been engaged in the practice of medicine since my graduation. I was with the Veterans Administration in [121] 1925. I examined Charles LaFavor. The first time I examined him was in December, 1925, and then again in August, 1927. His complaints to me were pain in the left leg and hip and left arm between the shoulder blades and headache and some stomach complaint, gas on the stomach; I think that was his complaint in 1925. In 1927 his complaints were of the same general character except at that time, he complained of pain in the back. The first examination, he was referred to me for a special examination of the spine and the second examination was a general examination. In 1927 I did not find any heart disability. In 1927 because of his complaint of pain in the lung on the left side, I referred him to a lung specialist, Dr. Feaman, I think. In 1925 in my examination I made a diagnosis of arthritis of the sacro-iliac. That is the joint where the sacrum articulates with the ilium or pelvic bone, the sacrum being the lower segment of the spinal column. Arthritis is any inflammation of the articular surface involving the synovial membrane or bone. At that time, in my opinion, that condition was of short duration. There were no clinical findings to verify the diagnosis, made on x-ray findings. By short duration, I mean probably a year or year and a half. In my opinion, from the condition I found

(Testimony of B. A. Seibert.)

at that time, he could work,—do work of a general character. In my opinion he could do farm work at that time. In 1927 I found the same condition except there had been a progression of this arthritic condition at that time. There was some involvement of the dorsal spine. I would not be able to say whether or not in 1925 that condition came from an injury, whether it was traumatic or due to infection. It is the present day opinion that most of these arthritises are from a focus of in- [122] fection, or direct invasion of the bacteria of a joint.

B. A. Seibert testified as follows on

Cross Examination

By Mr. NEWMAN:

I examined his heart in 1927. Not by x-ray, just a clinical examination. At that time he complained about soreness in the left arm, left side; pain in the lungs and left chest. It may be symptoms of heart trouble; I wouldn't say that it is exactly. In true angina pectoris there is a pain referred down the arm at times. Pain in the right arm and right chest is a marked symptom of angina pectoris. I found no heart trouble. I am not familiar with "Krummer" on heart diseases.

TESTIMONY OF
CONSTANCE M. MIKKELSEN
for Defendant.

CONSTANCE M. MIKKELSEN, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination

By Mr. WHITLEY:

My name is Constance M. Mikkelsen. I reside at Seattle, Washington. I am Assistant State Registrar. As Assistant State Registrar, I have access and custody of the records of the Washington State Board of Health. This is the original death certificate of Charles LaFavor (referring to defendant's exhibit A-26).

Constance M. Mikkelsen testified as follows on

Cross Examination

By Mr. McCUTCHEON:

I work for the State Board of Health. I am the keeper of these records. They are made out on the date they show. The certificate was filed with the local registrar, [123] January 13, 1932. I don't know when it was made out; there is no date on there. Only the date when filed; that, by law, has to be 72 hours after death, within 72 hours.

TESTIMONY OF EDWARD PERRY,
for Defendant.

EDWARD PERRY, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY:

My name is Edward Perry. I am a physician. I am the Coroner. I was the Pierce County Coroner on January 11, 1932. (Defendant's exhibit A-26 handed to witness) That is my signature. That is the original of a death certificate of Charles LaFavor, signed by me with the cause of death, et cetera. It was sent in to the local Health Registrar. At the time of the death of Charles LaFavor I made an external examination, no autopsy, in my official capacity as coroner, I examined the body, on the day of his death, January 11th, at the mortuary. There were no incisions or scars on the body at the time of the examination.

Edward Perry testified as follows on

Cross Examination.

By Mr. NEWMAN:

I examined the body of Charles LaFavor on January 11th, the day he died. I did not see the body afterwards. I saw the body only one time, January 11th, the day he died; I don't remember the time of day.

Mr. WHITLEY: Reads to the jury from the service records. [124]

TESTIMONY OF ALBERT C. FEAMAN,
for Defendant.

ALBERT C. FEAMAN, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY :

My name is Albert C. Feaman. I reside at Seattle, Washington. I am a physician and surgeon. I am employed by the United States Veterans Administration, Seattle, Washington. I am a graduate of the University of Minnesota, 1919. I am admitted to practice medicine in the State of Washington. I specialize in diseases of the heart and lungs. I have made that my specialty since 1919. I was resident physician at the Seattle Municipal Hospital, Tuberculosis and Contagious Hospital, for three years; following that, I was in charge of the heart and lung work at the sub-district office, Portland; was then sent to Boise, Idaho for three months,—opened the office there. I then returned to Seattle and was in charge of District 13 from 1923 to 1926,—composed of Oregon, Washington, Idaho, Montana and Alaska. Since that time, I have done the heart and lung work in the Seattle Regional Office. I took a post graduate course in 1925 and one at Oteen in September 1925. I examined Mr. LaFavor during his lifetime. The first examination was December 15, 1925. That was in connection with the lung examination only. At that time, he complained of distress and pain. He had an old pleuretic thickening of the left lung, I called it. At that time I made a special lung

(Testimony of Albert C. Feaman.)

examination. I examined him again on October 19, 1931,—a heart and lung examination. At that time he complained about this pain and distress in the left lower lung and he complained about dizziness, shortness of [125] breath on exertion, but no precordia pain, and pains in the vicinity of the old pleurisy. By precordia pain I mean a pain over the heart. He made no complaint of precordia pain at that time. On that examination I still found the same evidence of chronic fibrous pleurisy, adhesions of the diaphragm and lungs, retraction of the chest. The heart examination showed no evidence of any heart trouble at that time, by reason of the blood pressure, absence of thrills or murmurs or things we characterize as due to heart disease. Angina pectoris is a manifestation of pain as the result of several conditions. The most common one is a hardening of the coronary artery, the artery which supplies blood to the heart,—hardening of the aorta,—that is calcified deposits in the aorta or aorta valves or a myocarditis; that is, a chronic condition of the heart muscles; those are the most common factors. As to the different types of angina pectoris, there is the true type called the major type, angina pectoris true; there is an incipient type, milder form of the true angina pectoris; there is an emotional type, which is the emotional type resulting in spasms of the arteries, usually of the coronary or it might be general throughout the body. The usual causes of angina are isolated hardening of the coronary, which is a rare thing, or a hardening of the aorta, or both,

(Testimony of Albert C. Feaman.)

or a myocarditis. As to the symptoms of angina pectoris, the first thing that the patient complains of is a vicelike oppression over the chest, usually the upper portion, while it may be the lower portion, usually confined to the sternum, where it first approaches. This pain comes on while the patient is exerting himself, walking against the wind, up [126] stairs or running or in emotional anger. This pain radiates either to the neck or left arm, or both arms, or occasionally, it may appear in the groin or scrotum, but the main thing is, the patient stops immediately on having an attack, holds his breath, fearful of impending death. He presents a ghostlike, masklike appearance. He stands still, afraid to move, think; afraid to do anything that might bring a greater intensification of this pain. There are five different methods of termination of those attacks. The first is, he may suddenly die—the onset comes; he dies immediately following the attack—death of exhaustion and fear—dies from the shock and reaction of the attack. He may recover or fall in a faint; the other is that the attack may last for a little while, he will get over it and have exhaustion and in two or three days, the whole thing disappears; the last is, he may completely recover and may never have another attack again. I was present in the courtroom and heard the history of Charles LaFavor and heard the complaints as they were read. I believe I enumerated the symptoms that occur in angina pectoris,—that the result is a spasm causing pain to travel over those nerve trunks, from the

(Testimony of Albert C. Feaman.)

third cervical to the first dorsal and the course through which that follows in the neck and down the arm,—so that the symptomatology is not characteristic of a true angina pectoris—by complaining of pains in the left arm, alone,—it first has to have its origin in the heart, where the spasm takes place and radiates into the arm.

Q. Doctor, from the results of the examinations and complaints made by Mr. LaFavor, tracing it from the time he went into the service in 1917, until your last examination of him in October 1931, what in your opinion would [127] be the probable causative factor of the production of the angina pectoris, if he did have angina pectoris, as the cause of his death?

A. Because of the fact this condition of angina pectoris is associated with the deposit of calcium in the blood vessels, such as we call hardening of the arteries and in view of the fact that angina pectoris is given as the cause of the death and we knew that it is associated with the hardening of the arteries. In arthritis we note calcium is deposited along the joint surfaces—in long standing arthritis, as it develops, there is a deposition of the calcium in and around the blood vessel walls—to account for the history showing progressive arthritis, I would associate it with the calcium deposits—in the joint spaces causes his hypertrophic arthritis.

I never heard of a situation where an injury, trauma, in 1918 or 1919 caused an attack of an-

(Testimony of Albert C. Feaman.)

gina pectoris in January 1932. In my examination of the heart made in October 1931, I did not find any evidence of angina pectoris. The blood pressure was within normal limits. The pulse was normal, heart size normal, no evidence of myocardial changes, arthritis, showed no evidence of sclerosis. There was no outward or inward manifestation of a condition that could be associated with angina. In every heart examination there are a series of questions which we ask the patient in order to get certain information—if they have precordia pain, palpitation, cough and edema—those questions are asked every patient. This precordia pain was not given as a symptom by Mr. LaFavor at that time. He did complain of shortness of breath. The precordial pain is the outstanding pain which causes one to have fear of death. You have [128] to have that spasm of the coronary artery to have angina because the spasm is due to the blood to the heart being impeded and this pain is the outstanding thing. You have to have it before you have a true angina. At the time I examined him there was nothing to show he had had such a pain.

Albert C. Feaman testified as follows on

Direct Examination.

By Mr. NEWMAN:

He did not give me such a history. That is always underlined in every examination. When a man says he has precordial pain that is an outstanding characteristic and if he had, it would have

(Testimony of Albert C. Feaman.)

been recorded. He gave me a history of pain in the left chest. I do not recall that he gave me a history of pain in the left arm. He complained of giddiness, shortness of breath and I think my examination will show you that. In 1925 I made a lung examination; in 1931 I made the heart examination. Pain in the left arm and left chest is not one of the most common symptoms of angina pectoris. I have tried to show where and why the pain had to be localized in the area with the segments associated with it. I said the cause of the pain was spasm of the heart muscle and artery that supplies the heart with blood. Therefore, the pain must of necessity emanate from the source where it starts, and it follows the course down the arm to the wrist. The sternum is the breastbone here (indicating). The pain in angina pectoris does not radiate across the chest,—it goes up, following the course of the nerve. It has to follow the course of the nerve trunks. That would radiate and connect up with the brachial plexus— [129] goes up the neck to the shoulder and down the arm. This vicelike pain is the most common symptom of angina pectoris. I am not familiar with Krummer on Heart Diseases. I know that author's work. Part of the function of making the examination is to determine whether the person's heart was displaced from its natural position. From my examination I did not find displacement of the heart. I percussed the heart and I had X-rays on the

(Testimony of Albert C. Feaman.)

heart to confirm that. If a year or two prior to my examination the heart had been displaced on account of a pleurisy condition, that would have to exist at the time of my examination, if it were due as the result of pleurisy—change of posture—the heart hangs suspended. We can change our heart position by our position—pleural adhesions, fixed in one position. If it had been displaced by pleurisy adhesions prior to my examination, it would have shown in my examination. If that displacement was found by doctors prior to my examination and not by me, somebody was mistaken in their diagnosis, either myself or the other doctors. I don't recall having prescribed for his heart. I did not give him some powders for his heart—I do not give powders for the heart. Arthritis is one of the common causes of heart disease. By that I mean produces a change in the lining membrane of the inside of the heart. Those changes cause a leak of the valve that produces enlargement of the heart, produces murmurs and other changes in the blood pressure, very easily discernible. If the arthritis at that period back in 1918 was responsible for the heart disease, there would have been the manifestations of swelling of the ankles, shortness of breath, enlargement of the heart, leaking valves or something—subjective or objective symptoms. If you find [130] a condition of that kind, certainly he will complain of something, show some evidence, like the swelling of the ankles or blueness of the lips,—

(Testimony of Albert C. Feaman.)

those are the manifestations upon which we classify the beginning of a heart disease. In 1931 he complained of shortness of breath, which is a remote symptom. Syspnea in itself is not indicative; any person may walk up the stairs and be short of breath without having heart disease. The last examination by me was in 1931. I did not have an opportunity to perform an autopsy on the body. I did not know he was dead until I was called to the trial here.

Albert C. Feaman testified as follows on

Redirect Examination

By Mr. WHITLEY:

I did not find an abnormal condition of the heart in my examination of October, 1931.

Whereupon the defendant rested its case.

Whereupon plaintiffs' exhibit #26, after being identified, was offered and admitted in evidence without objection.

Whereupon the defendant made the following motion at the close of all the testimony.

Mr. DeWOLFE: Your Honor, for the purpose of the record, we move for an instructed verdict on behalf of the defendant on the same grounds and for

the same reasons interposed at the end of the plaintiffs' case.

Which motion was denied and exception noted on behalf of the defendant.

Whereupon counsel for the respective parties argued the case to the jury. [131]

Whereupon the Court gave the following instructions to the jury:

The COURT: The Court will instruct you concerning the law and when you retire to the jury room you will consider the evidence given you in the case and instructions given you by the Court, to decide upon the verdict, you should return—two plaintiffs sue the United States to recover on an insurance policy. One is the administratrix, who has appeared before you; the other is the beneficiary named in the policy.

It may not be necessary, but it might save discussion in the jury room if the Court explained to you why that was,—why the two plaintiffs are here. It may have been made plain to you by the attorneys the insured sued on this policy in his lifetime,—anything recoverable under this policy, because of his death would go to the beneficiary, the mother; any payments that had already matured, that he was suing to recover, which had already matured up to the date of his death, should go to his administratrix. Therefore, there are two plaintiffs.

The plaintiffs allege the enlistment of the insured, Charles V. LaFavor; that he took out \$10,000.00 of insurance, the condition of which was that if he

became totally and permanently disabled during the existence of that insurance, that the Government would pay so much a month for such total and permanent disability, or in case of his death, pay \$10,000.00; that he was discharged and at the time of discharge had become totally and permanently disabled.

The defendant answers does not deny his enlistment, admits the insurance but denies that at the time of his [132] discharge, March 21, 1919, he had become totally and permanently disabled and then alleges affirmatively, as an affirmative defense, that because of the failure to pay the premium becoming due April 1, 1919, this policy of insurance lapsed.

The plaintiff replies, denying that the policy had lapsed. The effect of that is that there is no dispute, that no premium was made after that deduction from his pay for March, 1919; another payment would become due the 1st of April, 1919, and that was not paid. Well, the denial by the plaintiffs in their reply that the policy lapsed, means not that there was a payment the first of April but that he had become totally and permanently disabled before midnight of the 30th of April, 1919.

The burden rests upon the plaintiffs of showing that he, on the 30th of April, 1919, at midnight, was totally and permanently disabled. The burden rests upon the plaintiffs of *having* that he was totally disabled from that time up to the time of his death; the further burden rests upon the plaintiffs of showing that on the 30th of April, 1919, at midnight, his

condition was such as to render it reasonably certain that he would be totally disabled throughout the remainder of his life.

The regulations which have the effect of law, define total disability, which is permanent, within the meaning of this law and this policy. Total disability as has been repeatedly stated to you in the course of the trial—is any impairment of mind or body that makes it impossible for the disabled person to continuously follow a substantially gainful occupation; that it shall be deemed permanent when it is founded upon conditions that make it reasonably certain [133] that such total disability will continue throughout the remainder of the disabled person's life.

Coming back, going over this definition again, in order to explain certain words used, the definition is that total disability is any impairment of mind or body, that makes it impossible for the disabled person to continuously follow any substantially gainful occupation—not necessarily the occupation which the disabled person the insured followed at the time of his enlistment, or any of the occupations he may have followed prior to his enlistment. The language of the definition is “unable to continuously follow any substantially gainful occupation”.

Now, if an insured person became disabled in a way that prevented him from following his pre-war occupation, or occupations, he might be totally disabled temporarily, but if he was able, by study, application and practice, to fit himself for some other

substantially gainful occupation, so he could follow it continuously—while he might be totally disabled for the time being, he would not be totally, permanently disabled.

Repeating the definition, in order to call your attention to other words that need explanation—the definition reads “Total disability is any impairment of mind or body that makes it impossible for the disabled person to continuously follow any substantially gainful occupation”. It is not necessary that one be able to follow an occupation without any interruption whatever, in order to come within the term “continuously”—the use of the word “continuously” as it here occurs, has a relative meaning.

You will understand it just as you would when used in ordinary speech, of someone being continuously employed. [134] The mere fact that one might be occasionally incapacitated from following an occupation—slight *a* temporary ailments, would not deprive—would not mean he was not able to continuously follow his occupation. Neither would the fact that a man did do some work once in a while, for which he was paid, mean that he was able to continuously be employed. If the one insured, continuously follows a substantially gainful occupation but only does so by injuring his health or jeopardizing his health, in a way that it hurts one, taking ordinary care of his health would not do, such a person cannot be said, within this law and policy of insurance, to be able to continuously follow a substantially gainful occupation.

The burden rests upon the plaintiffs of showing by a fair preponderance of the evidence that upon April 30, 1919, at midnight, the insured was totally disabled; the burden rests upon the plaintiffs of showing by a fair preponderance of the evidence that from that time to the time of his death, he was totally disabled; but, there is a greater degree of certainty required than a mere preponderance of the evidence regarding his future condition, on the 30th of April, at midnight; the burden rests upon the plaintiffs of showing that at that time, his condition was such as to render it reasonably certain that he would be totally disabled for the remainder of his life.

A preponderance of the evidence is the greater weight of evidence; that evidence preponderates which makes such an appeal to your reason, experience, and intelligence as to create and induce a belief in your minds. Where there is a dispute arising under the evidence, that evidence preponderates which is strong enough to create and induce [135] belief in your minds, in spite of the opposing evidence—or assaults made upon it by way of argument.

The pleadings which you will take to your jury room with you, where these issues are outlined, consist of the plaintiffs' third amended complaint; the answer of the defendant which is headed "Answer to the Second Amended Complaint" but you will not be misled by that fact because it was stipulated in the case that the answer to the Second Amended Complaint might stand as the Answer to the Third Amended Complaint.

The Court, in the course of the trial, was, as the Court understood it, at least, impliedly asked to instruct you in regard to admitted handwriting. The plaintiff, Mrs. LaFavor, while testifying, admitted certain handwriting to be that of Mr. LaFavor and did not admit (while I don't recall that she denied it), other handwriting.

Well, you have a right, if there is any question in your minds regarding it, you have a right to compare the admitted handwriting with that handwriting which may not have been admitted to be that of Mr. LaFavor, and if you can do so, determine from that comparison whether the questioned handwriting is his or not.

There were objections made by the attorneys at times concerning the statements of the attorneys—your oath was to try this case on the evidence, that means the testimony, it means what the witnesses tell you, after they have been sworn and sit before you and give their testimony; of course, the depositions in this case, they are included in the testimony—but if any of the attorneys on either side have made any statements at any time, whether they were made in an opening statement or whether they were made in the course of [136] the trial, that is not supported by your recollection of the evidence, you will wholly disregard any such statement.

You are, in this case, as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every question of fact, in this case the weight of the evidence and credibility of the witnesses. The Court will not enlarge upon that instruction except in one particular. You have been re-

peatedly instructed at length as to what you might and should take into account in discharging those functions; one of the rules is that you will take into account whether the testimony of the witness has been corroborated where you would expect it to be corroborated, if it were true.

The defense attorneys in their argument to you invoked that rule regarding the testimony of Dr. Steele, who had testified concerning an autopsy, arguing that if his statement in that respect was true, that some other doctor would have been called to corroborate it. The plaintiffs' contention in that respect was that there wasn't any real dispute and it did not require corroboration.

The Court will, again, repeat the rule in that respect. That is, you will take into account whether the testimony has been corroborated where you consider you have the right to expect it to have been corroborated if it were true.

You will not discredit any testimony given if you feel it did not need corroboration and you had no right to expect corroboration.

The form of verdict in this case you may not be familiar with. If you find under the evidence and instructions for the defendant, the form of verdict in that case, [137] simply reads as follows: "We, the jury in the above entitled case, find for the defendant" and all that it will require is the signature of the foreman.

However, if you find for the plaintiffs, the verdict is a little more complicated. It reads as follows: "We the jury empaneled in the above entitled cause,

find for the plaintiffs and further find Charles LaFavor became totally and permanently disabled——” then occur two words, one above the other; the word “on” and the word “before”—then reading on the blank day of the blank year—now, if *you able* to agree, if you find for the plaintiffs and are able to agree on the exact date when he became totally and permanently disabled, you would scratch out the word “before” and it will read “totally and permanently disabled on the blank day of blank”—fill in the blank. If you are unable to agree on the exact date but are able to agree he became permanently and totally disabled before a certain date, you will scratch out the word “on” and leave the word “before”. Probably after you look at this, it will be perfectly clear to you. Anything further, gentlemen?

COUNSEL: Nothing further, your Honor.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions, may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.

Service acknowledged by receipt of copy this Jan. 15, 1934.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attys for Plaintiffs.

[Endorsed]: Lodged Jan. 15, 1934. [138]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant for the settlement and certification of its proposed bill of exceptions and the parties agreeing that the proposed bill contains all of the material facts occurring upon the trial of the cause and all of the material evidence adduced during the trial, together with exceptions thereto and all material matters and things occurring upon the trial except the exhibits introduced in evidence, and the Court being so and not otherwise advised, save as to the instructions given at the close of the trial, which have been by me examined and corrected,

IT IS ORDERED that the foregoing, consisting of 108 pages, with the exception of lines 14 to 30, inclusive, page 53; lines 1 to 5, 10 to 14 and 19 to 31, page 54; lines 1 to 31, inclusive, page 55; lines 1 to 3, 7 to 30, page 56 and lines 1 to 11, inclusive, page 57, is settled and hereby certified by the undersigned judge presiding at the trial of said cause as a full and true bill of exceptions in said cause and as containing all of the material facts, matters, things and exceptions thereto, occurring upon the trial of said cause and evidence adduced during the trial, except the exhibits and the return and receipt of the verdict, and the Clerk is ordered to file the same and to transmit it to the Clerk of the Circuit Court of Appeals as a part of the record on appeal herein.

[139]

IT IS FURTHER ORDERED That the Clerk attach to the bill, over his certificate, all of the ex-

hibits admitted in the trial of the cause, which are numbered and lettered as follows:

Plaintiff's exhibits:

1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26.

Defendant's exhibits:

A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-12, A-13, A-15, A-16, A-17, A-18, A-19, A-20, A-21, A-22, A-23, A-24 and A-25.

Done at Tacoma, Washington, this 17th day of February, 1934.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed Febr. 17, 1934. [140]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on October 17, 1933, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.

Received a copy of the within Petition this 2 day of January, 1934.

A. W. NEWMAN,
JOHN McCUTCHEON,
Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [17]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To MARTHA LaFAVOR, as Administratrix of the Estate of CHARLES V. LaFAVOR, deceased, and LUCY ANN LaFAVOR, Plaintiffs, JOHN T. McCUTCHEON and W. A. NEWMAN, Attorneys for Plaintiffs:

YOU, AND EACH OF YOU, will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on October 17, 1933, and that the certified transcript of record will

be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE

United States Attorney.

TOM DeWOLFE

Asst. United States Attorney.

Received a copy of the within Notice of Appeal this 2 day of Jan., 1934.

A. W. NEWMAN

JOHN T. McCUTCHEON

Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [18]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon application of the defendant herein

It is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on October 17, 1933, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done at Seattle this 3rd day of Jan., 1934.

EDWARD E. CUSHMAN,

United States District Judge.

Received a copy of the within Order this 2 day of Jan., 1934.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attorneys for Plff.

[Endorsed]: Filed Jan. 4, 1934. [19]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

The District Court erred in denying defendant's motion for a non-suit which motion was made at the close of plaintiffs' case, for the reason and on the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not

made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence [20] adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for non-suit defendant took exception.

II.

The District Court erred in denying defendant's motion for an instructed verdict at the end of the entire testimony which motion was made for the reason and upon the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for an instructed verdict defendant took exception.

III.

The District Court erred in denying defendant's petition for a new trial, which denial was excepted

to by the defendant at the time of the interposition of said motion herein.

IV.

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment. [21]

V.

The District Court erred in admitting the following testimony of witness Julius Englund over objection of defendant:

Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?

A. Well, there was quite a difference in him; he was going around limping.

Q. He was limping?

A. Yes.

Q. What else?

A. Complaining about his side.

Mr. DeWOLFE: We move to strike that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Motion denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

VI.

The District Court erred in admitting in evidence the following testimony of witness William Hartwich over exception of defendant:

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting some water) and he came up to see how the well was coming along and we asked him to look into it; he says, "No. I can't look down."

Mr. WHITLEY: I object to what he said.

The COURT: Objection overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed. [22]

Q. He said on account of what?

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down——

Mr. DeWOLFE: We object to that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: On that point, I would like to have Your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose

of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The COURT: You may produce them at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWOLFE: The only case I found that admitted such statements was explanatory of the mental condition of the insured—other cases ruled them out even when taken by a physician.

The COURT: The objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

VII.

The District Court erred in admitting in evidence plaintiffs' exhibit #11 purporting to be an x-ray of the [23] assured on the ground that said exhibit was not properly identified.

VIII.

The District Court erred in admitting in evidence plaintiffs' exhibit #12 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

IX.

The District Court erred in admitting over the objection of the government, the following testimony of witness Bessie Elliott:

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes.

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says——

Mr. DeWOLFE: (Interrupting) I object to that as self-serving.

The COURT: It seems to be a statement made, accompanying an act as explanatory of the act, objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

X.

The District Court erred in admitting the following testimony of witness Martha M. LaFavor over the objection of the government:

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,——

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said "Where did [24] you get those bruises?" I said, "Don't you know?" and he said he did not know.

Mr. DeWOLFE: I will object to that. There is no mental disability pleaded.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Asst. United States Attorney.

Received a copy of the within Assignment of Error this 2nd day of Jan., 1934.

A. W. NEWMAN,

JOHN T. McCUTCHEON,

Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [25]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the documents listed below.

1. Third Amended Complaint.
2. Answer to third amended complaint.
3. Reply to defendant's answer to third amended complaint.
4. Verdict.
5. Judgment.
6. Order of September 26, 1933 joining additional party plaintiff.
7. Order of September 30, 1933 allowing defendant's answer to stand as to third amended complaint.

8. Order of October 6, 1933 extending time to lodge bill of exceptions.
9. Motion for new trial.
10. Order of December 11, 1933 denying motion for new trial.
11. Order of December 27, 1933 extending time to lodge bill of exceptions.
12. Petition for appeal. [141]
13. Notice of appeal.
14. Order allowing appeal.
15. Assignment of errors.
16. Citation on appeal.
17. Bill of exceptions.
18. Order of January 16, 1934 re extension of time for bill of exceptions.
19. Minute entry of January 26, 1934 re extension of time for settlement of bill of exceptions.
20. Order of January 30, 1934 extending time to file record on appeal.
21. Minute entry of February 13, 1934 re settlement bill of exceptions.
22. Minute entry of February 16, 1934 extending time to settle bill of exceptions.
23. Minute order of February 16, 1934 extending time to file record on appeal.
24. This praecipe.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Asst. United States Attorney.

Service acknowledged this 23rd day of February, 1934.

JOHN T. McCUTCHEON,
Attorney for Plaintiffs.

[Endorsed]: Filed Febr. 24, 1934. [142]

[Title of Court and Cause.]

CERTIFICATE OF CLERK
TO TRANSCRIPT.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the within typewritten transcript of record consisting of pages numbered from one to 142 inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Martha M. LaFavor, Administratrix of the Estate of Charles V. LaFavor, Deceased, and Lucy Ann LaFavor, Plaintiffs and Appellees vs. The United States of America, Defendant and Appellant, cause No. 8120, in said District Court, as required by praecipe of counsel filed and of record in my office in said District Court at Tacoma, Washington, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States District Court of Appeals for the Ninth Circuit.

I further certify, that attached to this transcript is the original citation in this cause.

I further certify that under separate certificate I am sending the original exhibits as required in order of court made in this cause and of record in this transcript.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred on behalf of the appellant herein for making of the appeal record, certificates and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record 413 folios @15¢ per folio	\$61.95
Appeal fee	5.00
Certificate to transcript.....	.50
Certificate to Exhibits.....	.50
	<hr/>
Total	\$67.95

I further certify that the amount of \$67.95 has not been collected for the reason that the United States of America, is the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, Washington this 12th day of March, 1934.

[Seal]

ED. M. LAKIN,

Clerk,

By E. W. Pettit,

Deputy. [143]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Southern Division.—ss.

The President of the United States of America, to
Martha LaFavor, as Administratrix of Estate
of Charles V. LaFavor, deceased, and Lucy
Ann LaFavor, Plaintiffs, and John T. Mc-
Cutcheon and W. A. Newman, Attorneys for
Plaintiffs:

YOU, AND EACH OF YOU, are hereby cited
and admonished to be and appear in the United
States Circuit Court of Appeals to be held at the
city of San Francisco, California, in the Ninth
Judicial Circuit, within thirty days from this date,
pursuant to an order allowing appeal filed in the
office of the Clerk of the above entitled Court, ap-
pealing from the final judgment signed and filed on
October 17, 1933, wherein the United States of
America is defendant, and Martha LaFavor, as ad-
ministratrix of the estate of Charles V. LaFavor,
deceased, and Lucy Ann LaFavor, are plaintiffs, to
show cause, if any there be, why the judgment
rendered against the said appellant as in said order
allowing appeal mentioned, should not be corrected
and why justice should not be done to the parties
in that [144] behalf.

WITNESSETH the Honorable Edward E. Cush-
man, United States District Judge for the Western

District of Washington, Southern Division, this 3rd day of Jan., 1934.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within Citation Jan. 2, 1934.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attys. for Pltff.

[Endorsed]: Lodged Jan. 4, 1934. [145]

[Endorsed]: No. 7433. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Martha La Favor, as Administratrix of Estate of Charles V. La Favor, deceased, and Lucy Ann La Favor, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 19, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

No. 7433

UNITED STATES OF AMERICA,

Appellant,

vs.

MARTHA LaFAVOR, as Administratrix of Estate of
CHARLES V. LaFAVOR, deceased, and
LUCY ANN LaFAVOR,

Appellees.

Upon Appeal From the District Court of the United States
for the Western District of Washington,
Southern Division.

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS,
United States Attorney

JOHN AMBLER
Assistant United States Attorney

OWEN P. HUGHES
Assistant United States Attorney

WARREN G. MAGNUSON
Assistant United States Attorney

Attorneys for Appellant

Of Counsel:

WILL G. BEARDSLEE

Director, Bureau of War Risk Litigation

RANDOLPH C. SHAW

Special Assistant to The Attorney General

TOM DeWOLFE

Special Attorney, Bureau of War Risk Litigation

Office and Post Office Address
222 Post Office Building,
Seattle, Washington.

FILED

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IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

No. 7433

UNITED STATES OF AMERICA,

Appellant,

vs.

MARTHA LaFAVOR, as Administratrix of Estate of
CHARLES V. LaFAVOR, deceased, and
LUCY ANN LaFAVOR,

Appellees.

Upon Appeal From the District Court of the United States
for the Western District of Washington,
Southern Division.

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellees, hereinafter called plaintiffs, by their third amended complaint (Tr. 2-5) sought to recover disability benefits against the United States on a war risk insurance policy held by CHARLES V. LaFAVOR. Inasmuch as Three Thousand Dollars

(\$3,000.00) of the original Ten Thousand Dollars (\$10,000.00) term insurance was converted, the plaintiffs sought by their complaint to recover disability benefits only on Seven Thousand Dollars (\$7,000.00) of the original term insurance (Tr. 4). It was alleged in the complaint that in January, 1918, while in the service, the assured contracted scarlet fever and pleurisy; and that later, in September, 1918, he was wounded from a fragment of a high explosive shell and from concussion was thrown into a shell hole and partially buried, causing a severe shock to his nervous system, and complicated injuries to his spinal column. As a result of the foregoing, it is alleged he developed hypertrophic arthritis of the lumbar spine, causing partial paralysis of the left leg and internal injuries to his lungs, liver and heart, by means of which it was claimed that he was unable continuously at the time of discharge and lapsation of his insurance to follow any substantially gainful occupation. And there was likewise present the usual allegation that said condition was then reasonably certain to continue throughout the remainder of the natural life of the assured (Tr. 3-4).

It was stipulated between counsel that the Government's answer to the second amended complaint

should stand as the answer to the third amended complaint (Tr. 10).

In its answer, the United States admitted that the assured died January 11, 1932, and that while in the service he applied for and was granted a policy of war risk term insurance in the amount of Ten Thousand Dollars (\$10,000.00), which policy had included therein the usual disability benefits. Then it was affirmatively alleged that the Ten Thousand Dollar (\$10,000.00) term policy lapsed for non-payment of the premium due thereon April 1, 1919, and was not in force and effect thereafter, and that Three Thousand Dollars (\$3,000.00) of the term insurance had been reinstated and converted and was in force at the time of the assured's death (Tr. 7-8). At the outset it might be well to state that there is no dispute between plaintiffs and defendant as to defendant's liability on the Three Thousand Dollars (\$3,000.00) converted contract, and that the sole issue below was defendant's liability with reference to the disability benefits on Seven Thousand Dollars (\$7,000.00) of the term insurance (Tr. 79-80). Although a disagreement was denied in defendant's answer (Tr. 7), the United States, in the trial below, in effect admitted the existence of the disagreement (Tr. 78).

After a trial which lasted approximately a week, and after denial of proper motions made by the defendant to withdraw the case from the consideration of the jury (Tr. 91-92 and 134-135), the jury were correctly instructed by the trial Court, and returned a verdict in favor of the plaintiffs, finding the assured permanently and totally disabled during the time his term insurance contract was in force and effect (Tr. 11).

A motion for a new trial on the part of the Government was denied (Tr. 16), and a judgment based on the verdict was entered, covering the usual disability benefits due since discharge, in favor of the plaintiffs against the United States, on the 17th of October, 1933 (Tr. 13-14).

Feeling aggrieved by this judgment, the Government appeals.

There are three questions to be considered by the Court on this appeal. Two of them relate to the rulings of the trial Court in admitting evidence on behalf of the plaintiffs. The first contention of the Government is that the Court erroneously admitted in evidence plaintiffs' exhibits 11, 12 and 13 (Tr. 36-38).

Assignments of error seven and eight (Tr. 151). deal with certain x-rays which were not properly identified and the only testimony with reference to which was the testimony of the doctor who interpreted the same. In fact, the x-rays were taken by another doctor on the floor above him, in the absence of the doctor who interpreted the same.

The second and other error complained of in admitting evidence will be found in assignments of error five, six, nine and ten (Tr. 149-152), which deal with the alleged error of the trial Court in allowing lay witnesses to testify as to complaints made by, and conversations had with the assured with reference to his physical condition when there was no mental disability in issue.

The last assignment of error deals with the Court's refusal to take the case from the jury, and its denial of the Government's motion for an instructed verdict at the end of all the testimony.

These assignments will be found at pages 147 and 148 of the Record. All other assignments of error are waived.

SPECIFICATIONS OF ERROR

I.

The District Court erred in denying defendant's motion for a non-suit which motion was made at the close of plaintiffs' case, for the reason and on the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence (20) adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled to which denial of motion for non-suit defendant took exception.

II.

The District Court erred in denying defendant's motion for an instructed verdict at the end of the entire testimony which motion was made for the reason and upon the ground that the evidence of the plaintiffs failed to make out prima facie case

sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for an instructed verdict defendant took exception.

III.

The District Court erred in admitting the following testimony of witness Julius Englund over objection of defendant:

- Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?
- A. Well, there was quite a difference in him; he was going around limping.
- Q. He was limping?
- A. Yes.
- Q. What else?

A. Complaining about his side.

Mr. DeWolfe: We move to strike that as hearsay.

The Court: Overruled.

Mr. DeWolfe: Exception.

The Court: Motion denied.

Mr. DeWolfe: Exception.

The Court: Allowed.

IV.

The District Court erred in admitting in evidence the following testimony of witness William Hartwich over objection of defendant:

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting some water) and he came up to see how the well was coming along and we asked him to look into it; he says, "No, I can't look down."

Mr. Whitley: I object to what he said.

The Court: Objection overruled.

Mr. Whitley: Exception.

The Court: Allowed (22).

Q. He said on account of what?

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down—

Mr. DeWolfe: We object to that as hearsay.

The Court: Overruled.

Mr. DeWolfe: On that point, I would like to have your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The Court: You may produce them at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWolfe: The only case I found that admitted such statements was explanatory of the mental condition of the insured—other cases ruled them out even when taken by a physician.

The Court: The objection is overruled.

Mr. DeWolfe: Exception.

The Court: Allowed.

V.

The District Court erred in admitting in evidence plaintiffs' Exhibit No. 11 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

VI.

The District Court erred in admitting in evidence plaintiffs' Exhibit No. 12 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

VII.

The District Court erred in admitting over the objection of the government, the following testimony of witness Bessie Elliott:

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes.

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says—

Mr. DeWolfe: (Interrupting) I object to that as self-serving.

The Court: It seems to be a statement made, accompanying an act as explanatory of the of the act, objection overruled.

Mr. DeWolfe: Exception.

The Court: Allowed.

VIII.

The District Court erred in admitting the following testimony of witness Martha M. LaFavor over the objection of the government:

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,—

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said "Where did (24) you get those bruises?" I said, "Don't you know?" and he said he did not know.

Mr. DeWolfe: I will object to that. There is no mental disability pleaded.

The Court: Objection overruled.

A R G U M E N T

I.

SUFFICIENCY OF EVIDENCE

It is not thought necessary to burden the Court with the pertinent statutes and regulations involving promulgation of war risk term insurance, or the definition of permanent and total disability thereunder,

inasmuch as this Court has had occasion to consider numerous cases of this type and is thoroughly familiar with the issues involved. Suffice it to say that to recover in this case, it was necessary for the plaintiffs to prove and sustain the burden that rested upon them, to show by the greater weight of the evidence that the assured was, on or before midnight, April 30, 1919, unable to follow continuously any substantially gainful occupation, and that at that time it was then reasonably certain that said condition would continue throughout the remainder of his natural life.

It is undisputed that no premiums were paid since discharge (Tr. 79).

Seeking to carry the burden that rested upon them, plaintiffs introduced the assured's wife as a witness, together with medical experts who made physical examinations of him, and also certain of his friends and co-workers, together with certain reports of medical examinations made by government doctors who examined the assured during and subsequent to his military service. The entire testimony is too voluminous to quote at much length, but it will be necessary to go into a portion of the same in order to properly substantiate the government's posi-

tion that the case should not have been submitted to the jury.

Julius Englund testified on behalf of plaintiff in part as follows:

“I was in the military service during the World War with the assured and met him in the hospital at Fort Lewis, Washington, in 1918. I then saw the assured in France (Tr. 22), and again saw him at Cushman Hospital in Tacoma in the early part of 1927 (Tr. 23). I noticed when I saw the plaintiff in 1927 at Cushman Hospital that there was a difference in him: he had not limped at Fort Lewis, and he was also complaining about his side; and I noticed the difference in his complexion, that his complexion was more sallow; and noticed the difference in his posture, and that he walked with a cane, stooping over forward; and that the assured at that time made no complaint about his heart, but complained about a pain in his chest. The assured was like all the rest of the patients—able to get up at his leisure.” (Tr. 25)

William Hartwich testified in part as follows:

“I met the assured around April, 1931. He was trying to erect a house near mine, in Tacoma. The assured’s wife did most of the work. The assured did most of the light work, like hammering and fitting up the house, but never worked long hours. That was in the summer of 1931. He would stay on this work from about 10 o’clock in the morning until 4 o’clock in the afternoon (Tr. 26). The plaintiff stated that he could not look down into a well which I was digging, because his heart bothered him.

The assured was always kind of stooped. He did not have a cane. His complexion was sallow and yellow. He had a twitch to his face."

On cross examination, Mr. Hartwich testified in part as follows:

"The assured would drive the car by my house in 1931. I did see him doing some work on the house—very light work—as early as 10 o'clock in the morning and as late as 4 o'clock in the afternoon." (Tr. 29)

The assured's wife, Martha M. LaFavor, testified in part as follows:

"When he went into the military service of the United States, he weighed approximately 175 pounds (Tr. 32)."

The service records, however, plaintiffs' Exhibit No. 14, show his weight upon induction into the army to be 140 pounds, and the medical examination made as a part of assured's application for reinstatement of his term insurance—government's Exhibit A-7—which application was dated January 25, 1921, shows his weight two years subsequent to discharge to still be around 140 pounds.

Mrs. LaFavor further states:

"The assured was healthy before induction into the army (Tr. 32). When he came home from the war he was lying on the bed and

walked with a cane. His mouth was full of blisters, and his eyes were bloodshot. He was blue and yellow, and thin. He weighed only 130 pounds (Tr. 33)."

At this point Mrs. LaFavor was withdrawn temporarily from the witness stand, and Dr. W. H. Gearing testified in behalf of plaintiffs, on direct examination, in part as follows:

"I first examined the assured on October 14, 1931."

The history given him by the patient will be found on pages 34 and 35 of the records. He likewise interpreted certain x-rays which were admitted to evidence (Tr. 35-37).

"From my examination I found the condition of traumatic arthritis. It is possible to assume that the injury he received in France was the exciting cause of the trouble, but what caused the arthritic process was problematical. It may have been due to injury and chronic infection of some sort. His history as given was that of extensive illness, influenza, pleurisy, which are infections which very likely produce an arthritis. The term "traumatic" means as the result of an injury (Tr. 39).

"From my examination of Mr. LaFavor, I would say that his was a chronic condition, or one of long standing, (Tr. 39) *but the exact time of the condition would be difficult to tell*, but I presume a period of years. It is my opinion that

the arthritis originated as a result of the injury sustained at the time of the injury in battle, or whenever the injury occurred. (Tr. 39). At the time I saw the assured, I did not think he could follow the occupation of a farmer. (Tr. 41)."

On cross examination, he stated in part:

"It is difficult to say how long the arthritic process had been going on, but that it was probably a matter of years rather than just the last week or so, and the process would assume the proportions that are shown by the x-ray in two or three years. The conclusion is that the arthritis was traumatic in origin, and from the history of the infectious diseases and the injury received, I arrived at the opinion that it was a traumatic condition. Without any injury or trauma, the same condition could have been shown. If it resulted from tonsillitis or prostatitis, without any trauma or injury, the same condition could have been shown. (Tr. 42-43).

"Arthritis is a progressive disease. After trauma or injury it usually comes into being practically immediately, from the standpoint of the patient's complaints; but from the standpoint of the infection, it may be harbored for years before the symptoms begin (Tr. 43)."

Dr. John Steele testified in part as follows, on direct examination:

"I examined the assured first on October 10, 1931 (Tr. 44). He was in my office the second time, but I just saw him at that time and did not examine him, but prescribed for him (Tr. 44-45). I did not find active tuberculosis, but merely noted the case as one for observation for

activity (Tr. 46). There was nothing in the examination of the heart to make a diagnosis of angina pectoris or coronary arterio-sclerosis, and no tubercle bacilli were revealed by the examination (Tr. 47).

“The patient gave a history of having a pain in wrist, and having been gassed, shortness of breath, and pains in the chest and shoulders and arms, trouble with his back, and difficulty in walking (Tr. 48). He also gave a history of pleurisy at Camp Lewis, scarlet fever, and spinal meningitis or diphtheria (Tr. 49) since his induction into the service. An autopsy was performed on the person of the assured after he died in January, 1932 (Tr. 49). From this autopsy I found a chronic heart condition (Tr. 51) that must have existed for many years.”

On cross examination, he stated in part that:

“The only diagnosis I made as to the lungs was a diagnosis of chronic pleurisy fibrous and inactive tuberculosis (Tr. 53). *I did not make any physical findings or any objective findings that would sustain the diagnosis of angina pectoris.* Very seldom can this be done (Tr. 53). In the heart condition the patient gave a history of attacks of pain starting in the chest and radiating to the arm, which were typical of angina pectoris. He did not say that word himself, because he did not know about it but it was very similar to angina pectoris attacks (Tr. 53). He said he had had attacks every year since the war.

“The cause of angina pectoris may be infection, or overwork, overstudy, strain, grief-stricken, or anything that will bring some additional work on the heart, or any additional infection on

the heart (Tr. 54). *Not many people can have angina pectoris for about ten or twelve years and have many attacks and still survive, but there are cases on record that do have (Tr. 54). As far as my examination of October 10, 1931, is concerned, there were not any objective symptoms there of angina pectoris.*

“The first time that any physical findings of angina pectoris were made was at the time of the autopsy (Tr. 55). The patient did not give me any history of his industrial activities or vocational training since discharge, and did not tell me about the period of time he spent on a farm at Colville.”

In *United States vs. McShane*, 70 F. (2d) 991, wherein it was shown that the assured was honorably discharged on August 5, 1919, after being returned from France because of tuberculosis contracted in service, that the tuberculosis was arrested for some three years after March, 1919, and that after return the assured attended the University and acted as salesman, but died of tuberculosis in 1927, the facts were held insufficient to show permanent and total disability on March 24, 1919, when the policy lapsed, so as to warrant recovery on the policy.

Bertha Nehring testified in part as follows, on behalf of the plaintiffs:

“The assured rented a house from me in 1928 and 1929. He appeared nervous and easily agitated about anything, and was pale and thin

and did not carry himself erect. He changed the tone of his voice when talking. I did not see him do any work (Tr. 57). I did not know anything about him previous to 1928 (Tr. 58.”

James Elliott testified in part as follows, in behalf of the plaintiffs:

“I met the assured about 1929 (Tr. 58). After that, when the assured moved in my neighborhood, I saw him once a week, but never saw him do any work. He did not have a very good complexion, and limped a little bit in one leg. He was afraid when I was blasting with dynamite, and ran up the road (Tr. 59).”

Bessie Elliott testified in behalf of the plaintiffs that:

“When my husband was blasting with Mr. LaFavor, Mr. LaFavor stated that he was ‘going to get out of here because powder makes me sick and bursts my head’—so he ran up the road with his hands over his ears, and was pale and scared.” (Tr. 60)

Whereupon the interrogation of the plaintiff, Martha M. LaFavor, was resumed, and she testified further in part as follows:

“From late April, 1919, he walked with a cane for two months. He did not do any work. He used the cane for three months.

“*We were married in March, 1920 (Tr. 62).* He worked from March, 1920, until October, 1920, in a flour mill sitting down sewing sacks

(Tr. 62). He worked three hours a day, sometimes four. He did not work for a power company that I know of (Tr. 62). He lay down in the daytime for an hour at a time. (Tr. 63)

“He was in vocational training from 1920 until 1922 (Tr. 63). He went to the Sacred Heart Hospital in July, 1921, in Spokane (Tr. 63) to have his tonsils taken out. He went to Sand Point in 1922 for two months, and came home sick. Then he went to Moscow, Idaho, where we got some more vocational training in poultry work. When he was in Moscow he went to work at nine in the morning, came home at noon and rested for two hours, then went back to work until four, then came home.

“We then went to Colville where we purchased a farm, and the government furnished the implements (Tr. 64). We lived on the ranch at Colville from 1923 to 1928 (Tr. 65). We have three children (Tr. 65). On the ranch Mr. La-Favor did not do any work. I did all the work. During that five-year period we did not work for anybody else.

“During the winters from 1924 until 1928 he did spend a couple of months at Cushman Hospital (Tr. 65). He came back from the trips to Cushman apparently improved in appearance and health. We sold the ranch in 1928, and came to Tacoma (Tr. 65) and from 1928 until 1931 lived in South Tacoma. During that latter period he did not do any work (Tr. 66). He weighed 128 pounds in 1929 (Tr. 66). We moved out to a little ranch in East 72nd Street in Tacoma in July, 1931. That is where I now live. My husband helped me build the house there, but I did most of the work.

“My husband died January, 1932 (Tr. 66). During the 12 years that we were married, I

never saw him do any heavy manual labor (Tr. 66). *Part of the time since discharge from the service, by husband manifested extreme anger toward me, but the first time that he did so was in 1923 (Tr. 67). The occasion was his run-down condition.*"

It will be noted that Mrs. LaFavor's testimony with reference to the work of her husband on the farm and his work immediately subsequent to discharge is contradicted by other witnesses in many material matters. For instance: It was shown undisputedly by the testimony of other witnesses that the plaintiff did some work on his farm from 1923 to 1928, and that he worked in a power plant subsequent to his discharge, which his wife denied.

Mrs. LaFavor testified further in part that:

"Two days before my husband's spells came on, he had a headache and his mind was somewhere else. He would go on talking to himself. Then he would say something and hit me, and then lie down and sleep for several hours (Tr. 68). He would have these spells about two days a month, and once a month (Tr. 74). He took aspirin for his headache right along. They got worse since 1923 (Tr. 75). I saw him lose his balance and fall in 1931. He was not able to hold any food part of the time (Tr. 76). He never worked at a power plant that I know of (Tr. 82);

"In January, 1920, he went to the Northwestern Business College. He left the flour

mill to go to business college at Spokane, to take vocational training (Tr. 85). After he got out of business college training he went on the McPherson Poultry ranch in 1922 at Sand Point, Idaho, to help with the chickens. After that he went to the University of Idaho for training (Tr. 85). He continued at the University of Idaho until 1923. My husband never worked with Mr. Bloom at or near Colville (Tr. 86)."

John M. Gilbo testified by way of deposition in behalf of the plaintiffs in part as follows:

"I knew the assured in France in 1918. The day I got acquainted with him he was not feeling very good. Next time I met him he was complaining about the pain in his breast. He mentioned about his left side. After he had eaten he complained about being ill. We were going in swimming, but went to the barracks instead. He said he did not want any lunch, he had some with him. He mentioned he did not feel well in the left side, but did not say anything about his heart. I saw him about four times (Tr. 89).

"The next time I saw him was in 1926, at Cushman Hospital in Tacoma. He was a lot more sickly, paler and thinner. He was limping a little. He mentioned his heart once at that time."

On cross examination, Mr. Gilbo stated that:

"The last time I saw him in France was on a divisional hike with him. The hike was 41 kilometers. The kilometer is five-eighths of an American mile."

The government moved for a non-suit on the ground that the evidence was insufficient to warrant the submission of the case to a jury, but the motion was denied by the Court, and an exception allowed (Tr. 90-91).

The testimony on behalf of the government will be referred to but briefly, as it is contended that the plaintiffs, by their own testimony, failed to make out a *prima facie* case sufficient to go to the jury, and the defense testimony will be referred to only insofar as it goes to corroborate the insufficiency of the assured's claim of permanent and total disability at the time his term policy lapsed.

Mr. Westmore, of the Northwestern Business College stated that the assured was in vocational training at his school from October, 1920, until March, 1922 (Tr. 92-93).

Mr. Harvey Bloom, a neighbor of the assured's at the time he was living on his ranch near Colville, from 1923 to 1928, stated that:

“During that period of time I saw the assured plowing, working in the orchard, and constructing some buildings, and saw him cutting and hauling wood, and I worked with him in threshing. He did carpenter work on his chicken house, and also on his dwelling house.

I have seen him take care of his chickens. We had arrangements with regard to exchange of work (Tr. 94). I went down and helped him two or three days on his house, and in return he was to help me with a little pruning the next spring in my orchard (Tr. 94). In one job we pitched bundles off the stack and into the machine, threshing, both of us together. He had 300 baby chickens in the first year, and a horse, a cow or two, and some hogs. I saw him milking the cows and taking them to and from pasture, and never saw him limp or use a cane, and never heard him complain or saw him sick (Tr. 94-95)."

George W. Johnson testified in behalf of the government by way of deposition in part as follows:

"After the assured returned from the army, I saw him in May, 1919. He was working during the spring and summer of 1919 in the mill. I believe he worked at the electric light plant after he worked at the mill. He was a fireman and shoveled coal (Tr. 100). I think they paid \$100.00 or \$125.00 for that work (Tr. 100)."

W. B. Heppner testified in part as follows, by way of deposition:

"I saw the assured in the spring of 1919 at the flour mill. As far as I know, he worked there about a year. He was sacking flour (Tr. 101)."

Paul Crum testified by way of deposition, on behalf of the government, in part as follows:

"I knew the assured in the early summer of 1919 to the fall of 1920, and knew that he worked in the summer of 1919 as fireman in the electric plant at Scobey, Montana, and that in 1919 and 1920 he worked in the shipping room of the milling company. While at the light plant he was firing and stoking the steam boiler, shoveling coal into the furnace. The work which he was doing was the type of work that would be considered as manual labor, and required physical exertion (Tr. 102).

"At the milling company he handled sacks of flour and wheat, and delivered to customers. These sacks of flour weigh 48 pounds and 98 pounds (Tr. 103)."

Mr. L. C. McPherson testified in behalf of the government, by way of deposition, in part as follows:

"From February to May, 1922, the assured was in vocational work in training for me, helping to take care of the feeding of poultry and also in hatching of baby chickens (Tr. 103-104). In the carrying of food for the chicken coops, approximately 30 pounds to 40 pounds were required to be carried (Tr. 104). He was required to carry that feed from 50 to 150 feet. It was level ground until he came to the door of the poultry house, and then there was a six-foot stairs to go up (Tr. 104).

"When he first came, for the first four or five weeks, he assisted me with the dairy work, and that consisted of milking about six cows and carrying the milk to the separator room. He milked six cows and carried the milk about 300 feet to the separator room (Tr. 104). His

duties, as a whole, required a good deal of walking and remaining on his feet during the day. The hours he was required to keep with regard to going to work and quitting work were approximately twelve hours, and this required his attention every day of the week (Tr. 104).

“During this period of time he complained of his lungs, said he had been gassed. He performed his work and duties satisfactorily (Tr. 105). He did not leave by reason of any physical disability. I do not remember that he was lame or limped, and if he had been noticeably lame I would have had opportunity to observe that (Tr. 105). He appeared to have a cough, or lung difficulty, which was mild and did not interfere with his work (Tr. 105). He did not have occasion to be off his work because of sickness.”

Mrs. McPherson testified by way of deposition on behalf of the government in part as follows:

“The plaintiff would carry a ten-gallon can of milk, and the can weighed 80 pounds. I did not observe any physical disability. He complained of his lungs, and seemed to have the appearance of being easily fatigued. I would not say he had a very noticeable cough, and was not absent from his work because of sickness at any time, and his employment was regular every day of the week (Tr. 107). He did not leave by reason of his health (Tr. 107).

“When he went to see his family in Spokane every fortnight, he had to walk to and from the station, three-quarters of a mile, carrying a suit case.”

The records of the University of Idaho were admitted in evidence, which disclosed that he first attended there as a student in June, 1922, and continued until March, 1923.

Testimony of Ella Olesen (Tr. 108-113) discloses the subjects taken and the grades received by the assured during his period as a student at the University of Idaho.

Dr. Pfeiffer, a government doctor, examined the assured in 1925, 1926 and 1927 (Tr. 114) and stated that on his first examination in March, 1925, he found nothing that would enable him to say that the assured could not work. In December, 1925, he found changes which indicated the man had a productive arthritis, which he did not find in the x-rays in March, 1925 (Tr. 117). In the next examination in March, 1926, he found early hypertrophic arthritis, worse than the condition found in December. The x-ray condition found in March, 1926, suggested that the condition was not more than a year or two old. The striking feature of the examination was the progression noted from time to time of the arthritic process ((Tr. 117). In December, 1926, he found that the man was decidedly worse, and characterized the case as progressive arthritis (Tr. 117).

Dr. Seibert testified, among other things on behalf of the government, that he, a government doctor, examined the assured in December, 1925 and August, 1927. In 1925 he made a diagnosis of arthritis of the sacro-iliac, and stated at that time that his opinion was that condition was of short duration—meaning, probably, a year or a year and a half. The conditions he found at that time did not preclude work of a general character, (Tr. 123-124). In 1927 he found the same condition, except there had been a progression of the arthritic condition (Tr. 124). In 1927 he stated that he did not find any heart disability (Tr. 123).

Dr. Albert C. Feaman, a government doctor, testified in part as follows, on behalf of the defendant at the trial below:

“That he examined the assured in December, 1925, and that at that time there were no complaints about pains over the heart (Tr. 128). The heart examination showed no evidence of any heart trouble at that time. He found, however, evidence of chronic fibrous pleurisy, adhesions of the diaphragm, and lungs; and retraction of the chest (Tr. 128).”

Dr. Feaman stated that he never heard of a situation where an injury in 1918 or 1919 would cause an attack of angina pectoris in January, 1932 (Tr. 131), and stated that in his examination of the

heart in October, 1931, he did not find any evidence of angina pectoris, and stated likewise that in every heart examination there are a series of questions which the patient is asked in order to get certain information, and one of them is in regard to a precordia pain. This precordia pain was not given as a symptom by Mr. LaFavor at that time. The doctor further stated that the precordia pain is the outstanding pain which causes one to have fear of death. The doctor did not find any abnormal condition of the heart in his examination in October, 1931 (Tr. 134).

After Dr. Feaman's testimony, both parties rested their cases, and the government's motion for an instructed verdict was denied by the Court, and exception noted (Tr. 134-135).

Plaintiffs' exhibit No. 14, which is the assured's service record, shows the usual declaration of the enlisted man prior to separation from service to the effect that he had no disability as a result of his military service. And likewise, it is proper to call to the attention of the Court the fact that in government exhibits A-6, A-7, A-8 and A-9, which were applications for reinstatement of his insurance from 1921 to 1926, the assured repeatedly affirmed in signed statements that he was not per-

manently and totally disabled. In government's exhibit A-2, which is form 526 and is in connection with the assured's claim for compensation, is a signed statement to the effect that subsequent to discharge he worked at the electric light plant at Scobey, Montana, at a wage of \$90.00 per month, and this is likewise disclosed in government's exhibit A-3, wherein assured's signed statement gives his occupation as a stationary gas engineer from April, 1919, to June 30, 1919, at a wage of \$90.00 per month. This is apparently the work referred to at the light plant. He states in the same exhibit that he worked at the flour mill from July, 1919, to January, 1920, but other witnesses give a longer period of employment for his work at the flour mill—noticeably W. B. Heppner (Tr. 101) who said he worked there a year. His wife states that he worked in the flour mill from March, 1920, until October, 1920 (Tr. 62), which is a period of eight months, and longer than the period that the assured states he worked at the flour mill in defendant's exhibit A-3.

It will be noted that Mrs. LaFavor, his wife, testified that he went to the Northwestern Business College almost immediately after he left the flour mill (Tr. 62-63), and this corresponds with

the testimony of Mr. Westmore of the Northwestern Business College, that he started his vocational training there in October, 1920.

In government's exhibit A-2, which is assured's claim for compensation, he states on item No. 11 that he has only partial physical disability; and likewise on item No. 11 in defendant's exhibit A-3, in answer to the question as to the nature and extent of disability, he answered: "Farmer by occupation; can no longer do heavy work. Fifty percent disability". It is important to note that in neither of these exhibits does he claim that he was totally and permanently disabled, although they were signed subsequent to the time of the lapsation of his insurance.

In plaintiff's exhibit A-5, a letter signed by Mrs. LaFavor, the wife of the assured, in December, 1925, it is stated that for the past ten or twelve weeks only she had done all the work *which was usually done by her husband*, the assured.

In government's exhibit A-20 and A-21, which are reports of physical examinations made by government doctors of the assured in 1921, it is important to notice that examinations disclose negative findings as to the heart and the prognosis on the

disabilities found was favorable.

Government's exhibit A-21 shows imbedded and infected tonsils, with a condition of pyorrhea in the teeth, both of which were infectious diseases. A tonsillectomy was recommended, according to government's exhibit A-21.

In summing up, with reference to the plaintiffs' lay and expert testimony, Dr. Gearing stated not that the assured was unable continuously in his opinion to follow a substantially gainful occupation at the time of the lapse of his insurance, but merely ventured the opinion that at the time of his examination in 1931 the man could not perform farming work. He was unable to tell of how long a standing the arthritic condition was, and stated that the arthritis may have been due to an infection, such as prostatitis, tonsilitis or other infectious disease rather than an injury in the service. It was likewise undisputed that the arthritic condition was a progressive condition (Tr. 43-44). It being a progressive disability, it is not surprising that the doctor was unable to venture an opinion that the disability was such that the man could not work at the time of the lapse of his insurance, or that it was then a total disability. For, as the government doctors testified, it may have and probably did have its

inception at a time many years subsequent to the expiration of his term contract.

Dr. Steele stated that not many people can have angina pectoris for ten or twelve years and still survive, but there are cases on record that do. He did not testify that the plaintiff was unable to follow continuously a gainful occupation, in his opinion, at the time of the examination, or at the date of discharge. He found no active tubercular condition, and found no physical or objective findings as to any heart disability. Dr. Steele, in examining the patient in 1931, did not even take any history of the assured's industrial activities since discharge, or even inquire about the history of vocational training of the assured. It is significant that, subsequent to the time that the plaintiffs now claim that the assured was permanently and totally disabled under his war risk insurance contract, he married and raised a family of three children. It is likewise significant that the first time he ever manifested an excitable condition, or extreme anger toward his wife, was in 1923, and the occasion was his run-down condition. This was four years after the lapse of his term insurance contract.

Subsequent to discharge, and from April to July, 1919, he worked at an electric light plant,

shoveling coal, at a substantially gainful wage. From March, 1920 until October, 1920, he worked at a flour mill, handling sacks and filling sacks with flour, doing heavy manual labor at a substantially gainful wage. He was in vocational training from October, 1920 until March, 1923, being at the Northwestern Business College in Spokane from October, 1920 until March, 1922. And from March, 1922 until June, 1922, he was with the McPhersons in Idaho in placement training on a poultry ranch. From June, 1922 until March, 1923, he was in institutional training at the University of Idaho. From 1923 until 1928, when he sold his ranch, he was on the farm near Colville, Washington, and was performing some work, according to the testimony. Later on he helped build his home in Tacoma. *Unglaub vs. U. S.*, 57 Fed. (2d) 650.

There was no sufficient medical or lay testimony to warrant submission of the case to the jury. The burden of proof was, of course, on the plaintiffs. Their long delay before bringing this suit was strong evidence that he was not permanently and totally disabled at the time the policy lapsed.

In *United States vs. Nickel*, 70 F. (2d) 873 it was held that the insurance contract in the case obligated the government to indemnify in the event

of death or total disability during the life of the policy. In the instant case it was incumbent upon the plaintiff to establish permanent and total disability before the lapse of the policy.

Eggen vs. United States, 58 F. (2d) 616; *United States vs. Pullig*, 63 F. (2d) 379; *United States vs. Hill*, 62 F. (2d) 1022.

The insurance does not cover total temporary or partial permanent disability. While a great deal has been said as to the phrase "permanent and total disability", no fixed rule has been established as applicable to all cases, but the circumstances of each case must largely conform in construing this phrase of the contract.

As said by the Supreme Court of the United States in *Lumbra vs. United States*, 290 U. S. 551, in an opinion by Mr. Justice Butler:

"The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to pre-

vent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative occupations. Frequently serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

“The above-quoted administrative decision is not, and manifestly was not intended to be, an exact definition of total permanent disability or the sole guide by which that expression is to be construed. If read literally, every impairment from time to time compelling interruption of gainful occupation for any period, however brief, would be total disability. And, if such impairment were shown reasonably certain not to become less, it would constitute total permanent disability. Persons in sound health occasionally suffer illness as ‘total disability’ while it lasts. But, clearly, it is not right to say that, if they remain sound but reasonably certain throughout life, occasionally to have like periods of temporary illness, they are suffering from ‘total permanent disability’. Such a construction would be unreasonable and contrary to the intention of Congress. ‘Total disability’ does not mean helplessness or complete disability, but it includes more than that which is partial. ‘Permanent disability’ means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health

or life. But manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time.”

Of course the government has in mind that the question in the case is: Did the Court err in directing a verdict for the government, and that the ruling must be applied that the evidence must be considered in its aspect most favorable to the plaintiffs, and that the weight of the testimony is always for the jury to determine, and that therefore the trial Judge should not direct a verdict unless the evidence is so conclusive that were a verdict directed for the plaintiffs the Court, in the exercise of a sound judicial discretion, would be compelled to set it aside. *Gunning vs. Cooley*, 281 United States 90; *Lumbra vs. United States*, supra.

And, as said by Judge Neterer in *United States vs. Hill*, 61 F. (2d) 651 (9th CCA):

“Nonemployment, of itself, is not evidence of impairment. And it is obvious that facts known or within the power of the plaintiff to produce are not presented. See *Massey v. United States*, (D. C.) 46 F. (2d) 78; *Third National Bank & Trust Co. v. United States* (C. C. A.) 53 F (2d) 599. Nor is smoke, as shown, causing cessation of work, or that the work was too hard, evidence of total and permanent impairment. Nor is voluntary cessation of special work, rather than compulsory cessation by reason of physical

and/or mental inability to work, of itself, evidence of total and permanent disability.

“This case is clearly distinguished from *United States v. Lesher* (C. C. A.) 59 F. (2d) 53. There is no evidence which raises a dispute about which reasonable men might honestly differ. *Day v. Donohue*, 62 N. J. Law, 380, 41 A. 934. No competent evidence of relevant consequence, clear, certain, carrying the quality of proof, having the fitness to produce conviction in the minds of reasonable persons, such that reasonable persons may fairly differ as to whether or not it proves the fact in issue. *Milford Copper Co. v. Industrial Comm.*, 61 Utah, 37, 210 P 993.

“We appreciate that the court may not look behind the finding of the jury predicated upon substantial evidence and when it is a matter of weighing the evidence, which is the sole province of the jury; but when the challenge is want of substantial evidence, the power of the court must be asserted as a matter of law.”

There is likewise in the case at bar evidence showing that the assured was examined at various hospitals, and there is a dearth of testimony as to his condition at those times, and the situation is analagous to that stated by Judge Neterer in *United States vs. Hill*, supra, and that remarked upon by the late Judge Rudkin in *United States vs. Blackburn*, 33 F. (2d) 564 (9th CCA).

In *Proechel vs United States*, 59 F. (2d) 648, in a case where an arthritic disability was involved,

the Court of Appeals for the Eighth Circuit stated that the plaintiff had the burden of showing lack of mental capacity or of opportunity or of both, to acquire such training as would fit him for some reasonably remunerative employment. The following language of Judge Otis, in the Proechel case is peculiarly applicable to the facts in the case at bar:

“Viewed in the light most favorable to the plaintiff, the evidence did not prove that the insured was permanently incapacitated from carrying on continuously any substantially gainful occupation not requiring free use of knees and ankles. There are such occupations. There was no showing that the insured was wanting in capacity to follow them or inability or opportunity to acquire training necessary to follow them or some one of them. One who would prove permanent total disability must prove there is that in the nature of the impairment causing disability, which, considering the capacity of the individual, will make it impossible for him through the probable duration of his life ever continuously to carry on any substantially gainful occupation. The element of permanency and all the elements essential to make a case must be proved. They cannot be found by speculation, guess, or surmise.

It will be noted that in the Proechel case the assured died in less than three years from the date of his discharge, and that a jury might have been warranted in that case in finding that while he lived he was totally disabled within the meaning of

the accepted definition. But in that case, as in this, where the death was many years after the lapse of the policy, the death did not result from the bodily impairment which caused his disability.

In the case at bar, it cannot be conceded that there was sufficient showing of total disability to warrant the submission of the case to the jury, but assuming for the purpose of argument that there was sufficient evidence showing the total inability at the time of the lapse of the contract on the part of the assured to perform any gainful work in a reasonably continuous manner, still there was a total failure to prove permanency of said disability.

As said further by Judge Otis in *Proechel vs. United States, supra*:

“The fact of death, a death resulting from a cause unrelated to the alleged impairment, is no more to be considered in determining whether the total disability of September 27, 1919, was permanent than if he had been killed in an automobile collision or suffered death from a stroke of lightning. It was for plaintiff to present substantial proof that the total disability existing on September 27, 1919, was founded on conditions then existing which rendered it reasonably certain on that date that the then total disability would continue throughout the life of the insured. The finding of permanency must be based on conditions existing before lapse of the insurance contract, not upon conditions thereafter coming into existence.”

And as said by the Supreme Court in *Lumbra vs. United States, supra*:

“And in the absence of clear and satisfactory evidence explaining, excusing or justifying it, the petitioner’s long delay before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before the policy lapsed.”

See also *United States vs. Johnson*, 70 F (2d) 399.

As was said by Judge Wilbur in *Evans vs. United States*, 43 F. (2d) 719 (9th C. C. A.):

“The appellants case did not depend upon the question of the service origin of the disease from which he died, but upon the degree of his disability therefrom; unless that disability was total and permanent during the life of the policy, the appellant could not recover.”

And as said by this court in an early case on appeal from the Western District of Washington, in *United States vs. McPhee*, 31 F. (2d) 243 (9th C. C. A.), speaking through the late Judge Dietrich:

“In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained.

“We can find no evidence in the record showing or tending to show that the appellee was

totally and permanently disabled at any time before the policy expired. * * *

“Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all. But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.

“War risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was in fact permanently and totally disabled, at some time before the contract lapsed.”

And in *Falbo vs. United States*, 64 F. (2d) 948 (9th C. C. A.), this Court stated as follows in its opinion:

“While, on this evidence, a finding of total disability in May, 1919, and of permanent disability in a much later period, would be justified, we concur in the judgment of the District Judge that it fails to show a condition of permanent disability in May, 1919, a disability then ‘reasonably certain to be permanent during lifetime’. *United States vs. McCreary*, 61 F. (2d) 804, 808 (C. C. A. 10, 1932). The testimony of plaintiff’s Physician in answer to questions by the court indicates the speculative character of the evidence on this material point.

‘Q. Suppose at that time, back in July, 1919, the Fourth, that he had taken proper treatment, hadn’t worked, and followed the proper course under medical direction, is it reasonably likely that he would have recovered?’

‘A. He may have.’

‘Q. Is it reasonably likely he would not have?’

‘A. Well, he may have recovered and he might not have.’

“We concur in and deem completely applicable here the views so well expressed by Judge McDermott in the Rentfrow Case: ‘Such cases as these, which are as frequent as they are unfortunate, make a strong appeal to the sympathies. An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances which may influence that conduct. We can find no support, in this record, for a finding that the tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed.
* * * ”

“Likewise, in this case, the record, in our

judgment, does not justify a finding that in May, 1919, the total disability, due to incipient tuberculosis, was reasonably certain to be permanent that is, to continue for appellant's life; his own testimony, as well as the entire record, left the question of whether or not his disease was then incurable entirely in the realm of speculation. See too, *Eggen vs. United States*, 58 F. (2d) 616 (C. C. A. 8, 1932); *United States vs. Stack*, 62 F. (2d) 1056 (C. C. A. 4, 1933; *Walters vs. United States*, 63 F. ((2d) 299, (C. C. A. 5, 1933); *Wise vs. United States*, 63 F. (2d) 307 (C. C. A. 5, 1933)."

And so in conclusion on the sufficiency of the of the evidence, we say that on the evidence presented below, to allow the verdict to stand to the effect that the assured was permanently and totally disabled before lapsation of his term insurance, would be a mere guess unsupported by any substantial evidence. *Blair vs. United States*, 47 F. (2d) 109. *Nicolay vs. United States*, 51 F. (2d) 190. *United States vs. Rodman*, 68 F. (2d) 351.

The record shows an absolute absence of substantial proof of assured's total and permanent disability during the life of the policy, and the Judge below should, under the evidence, have directed a verdict for the United States.

II.

This portion of the Brief covers assignment of errors 5, 6, 9 and 10 (Tr. 149-152). The government's complaint in brief is that the trial Court allowed lay witnesses to testify to hearsay statements and complaints which they heard the assured make subsequent to the lapse of his policy. Assignment of error No. 5 will be found to have occurred on page 23 of the record. Assignment of error No. 6 will be found to have occurred at pages 26 and 27 of the record. Assignment of error No. 9 will be found to have occurred on pages 60 and 61 of the record. Assignment of error No. 10 will be found to have occurred on pages 68 and 69 of the record. These rulings of the Court below allowing lay witnesses to testify as to hearsay matters in the form of complaints, and to statements which they heard the assured make at different times constituted the erroneous admission of hearsay and self-serving declarations in evidence, and deprived the government of its right of cross examination. *Seals vs. United States*, 70 F. (2d) 519. *United States vs. Balance*, 59 F. (2d) 1040. *Third National Bank vs. United States*, 53 F. (2d) 602. *Demeter vs. United States*, 66 F (2d), 188. *United States vs. Buck* (5th

C. C. A.) decided May 22, 1934, and as yet not reported.

Ignoring the hearsay rule in this type of litigation might easily afford the opportunity to open the door to fraud. A physician is not allowed to testify as to history taken from the patient, if the history was taken and the examination made only for the purpose of giving testimony. *Tyrakowski vs. United States*, 50 F. (2d) 766. If there is such a stringent rule regarding the admissibility of complaints made to a physician, why should a lay witness be allowed to testify as to hearsay and self-serving complaints and statement made in his presence by the plaintiff, who subsequently seeks to collect from the government on his insurance contract.

III.

The last assignments of error to be argued are assignments 7 and 8 (Tr. 151 which will be found to have occurred on pages 36 to 38 inclusive in the record. The testimony briefly shows (Tr. 36) that the assured was referred to a doctor upstairs in the same building where Dr. Gearing had his office, for the purpose of taking an x-ray, and the patient came down about ten minutes later with the

picture after it was developed (Tr. 36). Dr. Gearing, a witness, interpreted the picture and attempted to identify it preparatory to its introduction in evidence. The doctor was not present at the time the picture was taken.

Dr. Gering gave no testimony as to the type or accuracy of the machine by means of which the picture was taken. He did not state that the picture was a correct representation of the internal portions of the assured's body and did not personally take the picture, and was not present at the time the same was taken (Tr. 36-38). Where, therefore, was there any competent evidence sufficient to identify and warrant the introduction of plaintiffs' exhibits 11 to 13 in evidence? The admission of the same over the objection of the government constituted prejudicial error.

In *Ligon vs Allen*, 157 Ky 101, 162 S. W. 536, 51 L. R. A. (N. S. 842) the Supreme Court of the State of Kentucky held that to render an x-ray photo admissible in evidence, its accuracy must be established. In that case the Supreme Court of Kentucky said as follows:

“If, however, the photograph should not represent the fact as the witness saw it, it is not ad-

missible; and the only person who can show that it does represent the fact as the witness saw it is the witness himself. It necessarily follows, therefore, that, where the witness fails to make an x-ray photograph admissible by testifying to its accuracy, it is not admissible and should be rejected. This rule is recognized by all the authorities. See *Stewart, Legal Medicine*, Sec. 13; 2 *Wharton & M. S. Med. Jur.* Sec. 564; 3 *Witthaus & B. Med. Jur.* Sec. 779.

“In 1 *Greenleaf on Evidence*, 16th ed. Sec. 439h, it is said: ‘The use of photographs taken by the vacuum tube--Roentgen rays--may involve slightly different principles. Since the operator will usually not have perceived the object, usually a concealed bone, with his ordinary organs of vision, he will not be able to put forward the photograph as corresponding to the results of his own observation; nevertheless, if he can testify that the process is known to him (by experience or otherwise) to give correct representations, the photograph is in effect supported by his testimony and stands on the same footing as a photograph of an object whose otherwise invisible details have been rendered discernible by a magnifying lens.’

“The rule above announced has been more than once approved by this court. See *Louisville & N. R. Co. v. Brown*, 127 Ky. 746, 13 L. R. A. (N. S.) 1135, 106 S. W. 795, and *Bowling Green Gaslight Co. v. Dean*, 142 Ky. 686, 134 S. W. 1115. In the last-named case we said: ‘Of course, the accuracy of a photograph as a correct reproduction of what it purported to show should be established to the satisfaction of the court before being admitted as evidence, but when its accuracy is shown, we have no doubt of its admissibility. *Wigmore, Ev.* Secs. 790-797; *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L. R. A. (N. S.)

1135, 106 S. W. 795; *Higgs v. Minnesota, St. P. & S. Ste. M. R. Co.*, 16 N. D. 446, 15 L. R. A. (N. S.) 1162, 114 N. W. 722, 15 Ann Cas. 97; *Dederichs vs. Salt Lake City R. Co.*, 35 L. R. A. 802, and note, (14 Utah, 137, 46 Pac. 656); 2 *Elliott, Ev. Secs. 1224-1228.*' See also *Geneva v. Burnett*, 65 Neb. 464, 58 L. R. A. 287, 101 Am. St. Rep. 628, 91 N. W. 275, 12 Am. Neg. Rep. 104; *Mauch v. Hartford*, 112 Wis. 50, 87, N. W. 816, 11 Am. Neg. Rep. 63; *Miller v. Mintun*, 73 Ark. 183, 83 S. W. 918; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540; *Eckels v. Boylan*, 136 Ill. App. 265.

“Applying this well-settled rule to the facts of the case, it is apparent that appellee failed to establish the preliminary requirements necessary to make the photographs admissible. Dr. Ford merely states that he took the photographs. He does not state that they correctly represent what he saw, or how they were taken, or that he had ever taken an x-ray photograph before, or knew anything about how they ought to be taken. We are given no assurance as to the character or accuracy of his x-ray machine, or its condition or working order. While it may not be necessary to establish all of these facts in order to make the photographs admissible under the rule above stated, it is clear the rule requires that the accuracy of the photographs must be so established, for, if they do not show what the witness saw, they have no place in the case. In this respect the testimony of Dr. Ford is wholly insufficient; and, as no other witness testified upon this subject, the circuit court should have sustained appellant’s objection to the admission of the photographs. In view of the conclusion reached, it is unnecessary to consider the other errors assigned.

“For the error above indicated, the judgment is reversed, and the case remanded for a new trial.”

For the aforementioned errors, judgment of the court below should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS 10
FOR THE NINTH CIRCUIT

No. 7433

UNITED STATES OF AMERICA,
Appellant,

vs.

MARTHA LaFAVOR, as Administratrix
of Estate of CHARLES V. LaFAVOR,
deceased, and LUCY ANN LaFAVOR,
Appellees.

Upon Appeal from the District Court of the
United States for the Western District
of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN, Judge

BRIEF OF APPELLEES

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FILED

AUG 31 1934

PAUL P. O'BRIEN,

I N D E X

STATEMENT OF THE CASE 1
ARGUMENT 2

**IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
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MARTHA LaFAVOR, as Administratrix
of Estate of CHARLES V. LaFAVOR,
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Appellees.

Upon Appeal from the District Court of the
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HONORABLE EDWARD E. CUSHMAN, Judge

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The appellees admit that the appellant has set

forth a proper and correct statement of the issues involved as presented to the Jury.

A R G U M E N T

The appellees will not burden the Court with discussion of specifications of error Nos. I, II, III, IV, V, VI, VII and VIII, inasmuch as the Court is familiar with the Law, and in view of all the evidence submitted in the trial of this case, which took up the better part of three days, there is no prejudice shown by appellant's obvious desire to pick out these isolated incidents on which to base error.

This case turns squarely on the question of the sufficiency of all the evidence to sustain the verdict of the Jury and the judgment of the Court. Cases cited by appellant are not in point, in as much as those cases stood on their own facts.

The evidence in this case was rather voluminous, and an attempt will be made to boil it down, with special reference to appellee's Exhibits, Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26, introduced in evidence and sent up as a part of the record.

These exhibits show "that the examining physician of the Draft Board pronounced him in good health August 6, 1917; that he was admitted to the

base hospital at Camp Lewis January 3, 1918. Diagnosis: Pleurisy, chronic, fibrinous, thickened pleura. Later records also in evidence show he was tapped five times during the period January 3, to January 27, 1918. On January 27, 1918, he contracted influenza and from 14 tests, 7 showed positive for diphtheria and 7 negative. X-Ray on January 14, 1918, showed interlobular adhesion left-heart pushed a little to right; he spent a total of 98 days in the hospital at Camp Lewis.

The clinical records in various base hospitals in France show that he was wounded and gassed September 29, 1918, and lay in a shell hole. Diagnosis December 14, and 16, 1918: 1. Pleurisy, acute, left adhesive. 2. Arthritis chronic, involving left hip joint. All in line of duty. 3. Marked tenderness over left sacroillac joint and left lumbar region—complains of pain in left chest.

His field medical card shows: 1. Gas—Wounded. Diagnosis: 1. Gas inhalation. 2. Concussion from explosion. 3. Myositis—traumatic lumbar region. 4. Left adhesion pleurisy. 5. Arthritis chronic left hip joint.

Clinical records of October 4, November 7, November 26, December 5, December 23, and December 30, 1918, read as follows: Thrown in dugout by

shell explosion. 1. Neuresthenia. 2. Coughs, backache, nervous, sleeps poorly, weak, walks in a cramped position, shows tenderness and pain over left sacroillac joint. Diagnosis: 1. Concussion from explosion. 2. Manipulation and strapping at Orthopedic Clinic. 3. Myositis Traumatic. 4. Nature of disability: Pleurisy-athritis, chronic, left hip joint in line of duty.

Clinical records of the Government from December, 1920, on, show over the years, diagnosis as follows: 1. Concussion and gassed—pain in back since concussion. 2. Conjunctivitis chronic—strain of sacroillac joint. 3. Complains of shortness of breath, weak back, pain in back of left hip on stooping over, frequent headaches, blurring of eyes, nauseated and vomiting after breakfast. 4. Findings—result of an injury to spine from shell concussion, and this affects his legs, the left one the worse. Diagnosis: Arthritis, chronic, sacroillac bilateral—walks with limp favoring left leg—neuresthenia.

The succeeding Government findings up till the date of his death show a progressive impairment. Plaintiff's exhibit 24 admitted without objection. Rated LaFavor temporary total on February 15, 1927.

During the eighteen months he was in the service, he spent over six months in the hospital, 98 days at Fort Lewis and 92 days in France. The record shows that he was an apprentice in the electric plant at Scobey, Montana, from April to July, 1919, at \$90.00 per month and worked as a cereal packer in a flouring mill from July 7, 1919, to January 15, 1920, at \$100.00 a month and was off work three or four months during that time. His wife testified that he only worked four hours a day at any of this work from the day he was discharged, and that he had to come home and lie down at ten o'clock in the morning and would not go back to work until after two o'clock in the afternoon. She testified fully and completely of his inability to continuously follow any gainful occupation from the day he arrived home after his discharge in March, 1919, until the day of his death. Her testimony was that she saw him and observed him every day; that he had vomiting spells in the morning; could not maintain continued physical exertion; walked with a limp; and after 1923, periodically had spells when he apparently lost his mind. Pictures were placed in evidence showing the contrast in his physical appearance before and after his discharge. Of course, there was conflicting testimony, but the jury decided that in our favor. The Government's testimony, however, absolutely fails to show that he did

work continuously at any substantial, gainful occupation after his discharge, and their own clinical records are full of references to his war-time sickness and injury as being the cause of his physical incapacity. Doctor Goering positively testified that LaFavor was suffering in 1931, among other things, from traumatic arthritis which in his opinion had its origin in the war, and that such disease rendered him totally and permanently disabled under the terms of the policy.

A careful reading of the Government's clinical record as shown by the Exhibits above referred to, together with the other evidence introduced on behalf of the appellees, presents the true picture of Charles V. LaFavor's condition from the date of his discharge. The appellant's effort to break down this case by evidence of witnesses who observed the deceased only occasionally for short periods, totally fails.

The evidence submitted to the Jury clearly shows that the deceased was totally and permanently disabled from continuously following any substantially gainful occupation from March 24, 1919; it clearly shows an onward progressive disability to the date of his death. From that date until he died, there is no evidence in the records anywhere that he was capable of, or did continuously follow

any substantially gainful occupation.

We therefore pray that the judgment of the District Court be sustained.

A. W. NEWMAN,
JOHN T. McCUTCHEON,
Attorneys for Appellees.

No. 7435

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United States
Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL EAGLE, JOHN WILLIAM LANGS,
and PLOMB TOOL COMPANY,
a Corporation,

Appellants,

vs.

P. & C. HAND FORGED TOOL COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States For the District of Oregon.



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In the District Court of the United States for the District of
Oregon

No. E-9154

SAMUEL EAGLE, JOHN WILLIAM LANGS, and PLOMB
TOOL COMPANY, a corporation,

Plaintiffs-Appellants,

vs.

P & C HAND FORGED TOOL COMPANY, a corporation,
Defendant-Appellee.

CITATION.

United States of America—ss:

The President of the United States of America, to P & C Hand
Forged Tool Company, a corporation, defendant, and to
T. J. Geisler, its solicitor, GREETING:

You are hereby cited and admonished to be and appear in the
United States Circuit Court of Appeals for the Ninth Circuit
at San Francisco, California, within thirty (30) days from the

date hereof, pursuant to a petition for appeal filed in the Clerk's Office of the District Court of the United States for the District of Oregon; wherein Samuel Eagle, John William Langs and Plomb Tool Company, a corporation, are the plaintiffs-appellants, and P & C Hand Forged Tool Company, a corporation, is defendant-appellee, to show cause, if any there be, why the decree and order in said petition for appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at Portland, in the District and Circuit aforesaid this sixth day of November, 1933.

JAMES ALGER FEE

U. S. District Judge for the District of Oregon. [1*]

Service of the above and receipt of a copy thereof duly certified to be a correct copy by W. E. Ramsey, of solicitors for plaintiffs-appellants, is hereby admitted this 6th day of November, 1933.

T. J. GEISLER,

Solicitor for Defendant-Appellee.

[Endorsed]: Filed Nov. 7, 1933. [2]

In the District Court of the United States for the District of
Oregon

November Term, 1930.

BE IT REMEMBERED, That on the 21st day of November, 1930, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit: [3]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

BILL OF COMPLAINT ON LETTERS PATENT No. 1380643

Plaintiffs, complaining of the above named defendant, COMPLAIN and ALLEGE:

I.

That during all the times herein mentioned Plomb Tool Company, one the plaintiffs herein, was and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of the State of Delaware. That plaintiffs Samuel Eagle and John William Langs are citizens and residents of British Columbia and Dominion of Canada.

II.

That during all the times herein mentioned the defendant P. & C. Hand Forged Tool Co. was and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Oregon, and is a citizen and resident of the State of Oregon.

III.

That this Honorable Court has jurisdiction of the cause of suit herein and the same is a suit in equity arising under the patent laws of the United States and is based upon the infringement by the defendant of Letters Patent No. 1380643 [4] granted on the 7th day of June, 1921, to Samuel Eagle, one of the plaintiffs herein, for an Improvement in Wrenches.

IV.

That on and prior to the 13th day of October, 1920, Samuel Eagle, one of the plaintiffs herein, then and now a citizen of the Dominion of Canada and then a resident of Gilbert Plains, in the Province of Manitoba, in said Dominion of Canada, was the first original and sole inventor or discoverer of a certain new and useful Improvement in Wrenches not known or used by

others in this country before his invention and discovery thereof and not patented or described in any printed publication in this or in any foreign country before his invention or discovery thereof, or more than two (2) years prior to his hereinafter mentioned application for Letters Patent of the United States, and not in public use or on sale in this country for more than two (2) years prior to the date of his said application for said Letters Patent of the United States, and which had not been abandoned, nor patented, nor caused to be patented by him, his representatives or assigns in any country foreign to the United States on an application filed more than twelve months prior to the filing of his application for Letters Patent of the United States as hereinafter mentioned.

V.

That the said Samuel Eagle on or about the 13th day of October, 1920, being then, as aforesaid, the first original and sole inventor or discoverer of said Improvement in Wrenches, duly filed an application for Letters Patent of the United States of America in the Patent Office of the United States disclosing, describing and claiming said [5] invention in accordance with the then existing laws of the United States; that thereafter and on the 7th day of June, 1921, the said Samuel Eagle having fully complied with the requirements of the law in such cases made and provided, there was issued to said Samuel Eagle, his heirs and assigns, Letters Patent of the United States of America, bearing No. 1380643, for said invention, whereby for the term of seventeen years from the said 7th day of June, 1921, there was granted to said Samuel Eagle, his heirs and assigns, the full and exclusive right to make, use and vend said invention throughout the United States and the territories thereof as, by the original of said Letters Patent or a duly certified copy thereof in court to be produced, will more fully appear; that a true and correct

copy of said Letters Patent, omitting drawings, as so issued, is hereto attached marked Exhibit "A" and by this reference thereto made a part hereof.

VI.

That on or about the 20th day of May, 1930, the said Samuel Eagle, one of plaintiffs herein, being the patentee named in said Letters Patent No. 1380643, for a valuable consideration, made and executed a certain exclusive license agreement bearing date as of that day wherein and whereby the said plaintiff, Samuel Eagle, granted unto plaintiff Plomb Tool Company, a Delaware corporation, the sole and exclusive license to manufacture and sell wrenches embodying said patented invention throughout the United States of America and the Dominion of Canada, reserving, however, for the benefit of Diamond Tool Company, a Washington corporation, the right to manufacture and sell for a period of two years from the said 20th day of May, [6] 1930, not to exceed two thousand wrenches per year in the Pacific Northwest of the United States of America; that under and by virtue of the said license agreement the plaintiff, Samuel Eagle, reserved unto himself a royalty for each and every wrench so to be manufactured and sold by the plaintiff, Plomb Tool Company, within said territory, which royalty plaintiff Plomb Tool Company promised and agreed to pay as and when the said wrenches embodying said patented invention were manufactured; that ever since said date plaintiff Plomb Tool Company has been and now is the sole and exclusive licensee of the plaintiff, Samuel Eagle, in and under said Letters Patent, and had and now has the sole and exclusive right to make and vend the said wrenches throughout the United States of America, with the exception of the right reserved for the benefit of said Diamond Tool Company, all as, by the original of said license agreement in court to be produced, will more fully appear.

VII.

That thereafter and on or about the 23rd day of September, 1930 the plaintiff, Samuel Eagle, for a valuable consideration, assigned, transferred and set over unto the plaintiff, John William Langs, his heirs, successors and assigns, an undivided one-half interest in, to and under the said Letters Patent of the United States and in and to such license agreements as had theretofore been executed and granted by the plaintiff, Samuel Eagle, and it was expressly understood and agreed by and between the said plaintiff, Samuel Eagle, and the plaintiff, John William Langs, that the said plaintiff, John William Langs, had an undivided one-half interest in and to said Letters [7] Patent of the United States from the date said Letters Patent were issued to-wit: the 7th day of June, 1921; that the plaintiff, John William Langs by virtue of said assignment during all the times herein mentioned has had and owned and does now have and own an undivided one-half interest in and to the said Letters Patent of the United States and in and to the said license agreement with the plaintiff, Plomb Tool Company, as by the original of said assignment in court to be produced, will more fully appear.

VIII.

That under and by virtue of said Letters Patent and said License agreement and said assignment the plaintiffs are entitled to sue for injunctive relief against any infringement of said Letters Patent and to recover any profits and/or damages arising out of the infringement of said Letters Patent.

IX.

That the said invention is of great utility and value; that the plaintiffs have manufactured and sold and have caused to be manufactured and sold said wrenches embodying said patented invention in large and increasing numbers throughout the United

States; that plaintiffs have expended large sums of money in promoting the manufacture and sale of said wrenches made in accordance with said patented invention; that plaintiffs at all times have been and still are prepared to supply all demands of the general public for said wrenches embodying said patented invention; that defendant and the public generally have been given notice that the wrenches so made and sold are covered and protected by said Letters Patent either by affixing and stamping thereon the word "Patented" together with the day and year said [8] Letters Patent were granted, or, since the 7th day of February, 1927, by affixing and stamping thereon the words and figures, to-wit: "Patent No. 1380643"; that the public has in general acknowledged the validity of said Letters Patent No. 1380643 and has respected plaintiff's rights therein and thereunder.

X.

That as plaintiffs have been informed, believe and therefore allege, the defendant, well knowing the premises but in violation of the exclusive rights of the plaintiffs in and under said Letters Patent and said License agreement, within six years prior to the commencement of this suit, have knowingly infringed and still continue to infringe upon said Letters Patent, within the District of Oregon, and elsewhere within the United States of America by making and vending wrenches embodying said patented invention, and the claims thereof, without license, permission or authority of the plaintiffs; that defendant threatens to continue said infringement; that its infringing acts have the effect of inducing others to infringe upon and against said Letters Patent; that by said infringing acts, defendant has wrongfully converted to itself trade and profits to which the plaintiffs were and are entitled and which the plaintiffs would otherwise have received and enjoyed; whereby plaintiffs have been caused great and irreparable damage and injury and the defendant will,

if it is allowed to continue said infringement, further irreparably injure and damage the plaintiffs.

XI.

That prior to the commencement of this suit, plaintiffs have given actual notice to defendant that defend- [9] ant has infringed and is infringing upon and against said Letters Patent and has demanded of defendant that defendant cease said infringement but the defendant, notwithstanding said notice and demand, continued and does now continue to infringe said Letters Patent.

XII.

That in order to prevent further irreparable damage and injury to the plaintiffs by reason of said infringing acts of the defendant, the defendant, its officers, agents, employees and confederates should be enjoined during the pendency of this suit, and that they and each of them should be perpetually enjoined by the final decree of this court from the further infringement of said Letters Patent.

WHEREFORE, plaintiff prays for a decree of this court, as follows:

1. That said Letters Patent of the United States of America No. 1380643, dated the 7th day of June, 1921, are good and valid and are owned by the plaintiffs, Samuel Eagle and John William Langs, and have been infringed by the defendant;

2. That the defendant, its officers, agents, employees and confederates and each of them be perpetually enjoined by the final decree herein from directly or indirectly manufacturing, using and/or selling and/or causing to be manufactured, used and/or sold, and or/threatening to manufacture, use and/or sell wrenches made according to said invention embodied in said Letters Patent No. 1380643; that a preliminary injunction may be granted the plaintiffs against the defendant during the pen-

dency of this suit to the same purport, tenor and effect as hereinbefore prayed for in [10] regard to said perpetual injunction;

3. That the defendant be decreed to account to the plaintiffs for all gains, profits and advantages realized by the defendant from its said infringement and unlawful manufacture and sale of said wrenches involving said patented invention and that in addition to said gains, profits and advantages so accounted for that the plaintiffs recover from the defendant the damages caused plaintiffs by reason of said infringement and that the plaintiffs have judgment against the defendant for the amount which upon said accounting shall be found to represent said gains, profits and advantages, and said damages, and for plaintiffs' costs and disbursements incurred herein.

4. For such other and further relief as to the court may seem equitable in the premises.

CAKE & CAKE

JAUREGUY & TOOZE

Solicitors for Plaintiff.

LAMAR TOOZE

Of Solicitors for Plaintiff.

[Endorsed]: Filed November 21, 1930. [11]

AND AFTERWARDS, to wit, on the 11th day of December, 1930, there was duly filed in said Court, an Answer in words and figures as follows, to wit: [12]

[Title of Court and Cause.]

ANSWER

The above entitled defendant hereby appears by its attorney, Theodore J. Geisler, and answers the Bill of Complaint herein as follows:

I.

With respect to Paragraph I of the Bill of Complaint:

The defendant is without knowledge as to the matters therein alleged.

II.

With respect to Paragraph II of the Bill:

Defendant admits the allegations therein alleged.

III.

With respect to Paragraph III of the Bill:

Defendant admits that this cause is based on the alleged infringement of letters patent of the United States, but defendant denies that the said alleged patent is valid or that defendant has infringed upon the same. [13]

IV.

With respect to Paragraph IV of the Complaint:

Defendant denies that Samuel Eagle on or prior to October 13, 1920 was the first original, or sole inventor or discoverer of any new and useful improvement in wrenches, not known or used by others in this country before his invention or discovery thereof, or not patented or described in any printed publication in this or in any foreign country before his invention or discovery thereof, or more than two years prior to his application for patent in the Bill alleged, or not in public use or on sale in this country for more than two years prior to the date of said application; but defendant is without knowledge whether said alleged improvement was not abandoned by said Samuel Eagle, or not patented nor caused to be patented by him or his representatives or assigns in any country foreign to the United States, or on an application filed more than twelve months prior to the filing of his said application for letters patent.

V.

With respect to Paragraph V of the Complaint:

Defendant denies that Samuel Eagle at any time was the first, original, or sole inventor or discoverer of any improvement in Wrenches; admits that he filed an application for letters patent of the United States describing and claiming an alleged invention; is without knowledge whether said Samuel Eagle fully or otherwise complied with requirements of the law in such cases made or provided; denies that there was issued to said Samuel Eagle, his heirs, or assigns, any valid letters patent of the United States, but to the contrary the alleged letters patent, No. 1,380,643, referred to in Paragraph V of the Bill, and claimed to be issued for an alleged invention, were and always have been null and void because of the said Samuel Eagle not having invented any of the alleged improvements purported to be described by said alleged [14] letters patent.

Defendant further denies that Exhibit "A" attached to the Bill is a true and correct copy of the letters patent, and states with respect thereto that without the drawings constituting part of and referred to in the specification of said letters patent, the same is wholly incomplete and incomprehensible.

VI.

With respect to Paragraph VI of the Bill:

Defendant is without knowledge as to the matters therein alleged.

VII.

With respect to Paragraph VII of the Bill:

Defendant is without knowledge as to the matters therein alleged.

VIII.

With respect to Paragraph VIII of the Bill:

Defendant denies that under or by virtue of said letters patent or said license agreement, or said assignment, the plain-

tiffs are entitled to sue for injunctive relief against any infringement of the alleged letters patent or to recover any profits or damages arising out of the alleged infringement of said alleged letters patent.

IX.

With respect to Paragraph IX of the Bill:

Defendant denies that the alleged invention is of great or any utility or value; defendant is without knowledge as to whether plaintiffs have manufactured or sold or caused to be manufactured or sold any wrenches embodying said alleged invention; or whether plaintiffs have expended any money in promoting the manufacture or sale of said wrenches; or whether plaintiffs have been or still are prepared to supply all demands of the general public for said wrenches; and defendant is without knowledge as to [15] whether the plaintiffs have fixed or stamped in any manner any notice of the granting of said alleged letters patent upon the said wrenches; and defendant denies that the public has in general or at all, acknowledged the validity of the alleged letters patent or has respected the same as conferring any rights whatsoever therein or thereunder upon the plaintiffs.

X.

With respect to Paragraph X of the Complaint:

Defendant denies that it has been guilty of any violation of any exclusive rights of the plaintiffs, in or under any valid letters patent at any time, or have in any manner infringed, or continue to infringe, upon any letters patent or claims thereof of the plaintiffs at any place; and defendant further denies that it threatens to continue said or any infringement; and defendant further denies that any act committed by it has induced others to infringe upon or against any letters patent of the plaintiffs; defendant further denies that it has been guilty of any acts whereby defendant wrongfully converted to itself trade or profit

to which the plaintiffs were or are entitled, or which the plaintiffs otherwise would have received or enjoyed; and defendant further denies it has caused any damage or injury, or done anything which is liable to cause damage or injury to the plaintiffs whatsoever.

XI.

With respect to Paragraph XI of the Complaint:

Defendant admits that plaintiffs notified it of said alleged letters patent, but again denies that the defendant infringed upon any letters patent of the plaintiffs.

XII.

With respect to Paragraph XII of the Complaint:

Defendant denies that by reason of any act committed or intended to be committed, there is any need for injunctive relief [16] being granted to the plaintiffs in this suit, whatsoever.

And the defendant further answering the Bill of Complaint alleges:

1. That Samuel Eagle was not the original, nor first inventor or discoverer of any material or substantial part of the alleged invention purported to be described in the alleged letters patent herein sued upon.

2. That the alleged new and useful improvement in Wrenches purported to be set forth by said alleged letters patent, No. 1,380,643 herein sued on, was not a patentable invention or discovery in view of the known state of the prior art.

3. Defendant upon information and belief further alleges that the alleged invention or discovery purported to be set forth in said alleged letters patent, and every material part thereof, was well known and used prior to the alleged discovery or invention thereof by said Samuel Eagle; and that devices and combinations embodying and showing substantially the alleged invention are found fully shown by various publications and let-

ters patent issued prior to the alleged discovery or invention of the said Eagle. That defendant is now making due and diligent search for the evidence of such prior knowledge, prior use, and prior publications, and defendant prays that the facts with respect to such prior knowledge, prior use and prior publication as may be ascertained by defendant, may be inserted by it by amendment of this Answer so as to make this Answer more definite and certain in this respect.

WHEREFORE Defendant prays that the Bill of Complaint herein be dismissed, and that it recover its costs and disbursements herein.

P & C HAND FORGED TOOL COMPANY

By: John N. Peterson, President

T. J. GEISLER

Attorney for Defendant.

[Endorsed]: Filed December 11, 1930. [17]

AND AFTERWARDS, to wit, on Monday, the 15th day of May, 1933, the same being the 59th judicial day of the Regular March Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [18]

[Title of Cause.]

This cause came on for final hearing before the court upon the pleadings and the proofs, the plaintiffs appearing by Mr. Lamar Tooze and Mr. Elmer Ramsey, of counsel, and the defendant appearing by Mr. T. J. Geisler, of counsel. Whereupon the Court being now fully advised in the premises, renders its opinion herein and directs that findings and decree be prepared in accordance therewith [19]

AND AFTERWARDS, to wit, on the 27th day of May, 1933, there was duly filed in said Court, a Motion for Leave to File Petition for Rehearing, in words and figures as follows, to wit: [20]

[Title of Court and Cause.]

MOTION

Come now the plaintiffs and each of them and move the Court for an order granting plaintiffs leave of Court to file a petition for rehearing of the decree of Court entered herein on the 15th day of May, 1933, under the terms of which decree plaintiffs' patent was declared invalid.

CAKE & CAKE
JAUREGUY & TOOZE
W. E. RAMSEY
Of Attorneys for Plaintiffs.

The above motion is predicated upon Equity Rule No. 69 and the procedure as indicated in *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350, and as commented upon in *Hopkins' New Federal Equity Rules Annotated*, 2nd Edition.

[Endorsed]: Filed May 27, 1933. [21]

AND AFTERWARDS, to wit, on the 29th day of May, 1933, there was duly filed in said Court, Findings of Fact and Conclusions in words and figures as follows, to wit: [22]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause, brought by the plaintiffs against the defendant for the infringement of letters patent of the United States

granted to Samuel Eagle June 7, 1921, No. 1,380,643, for improvement in Wrench, having been heard and argued by counsel, the Court now, upon consideration thereof, makes the following

FINDINGS OF FACT

1. That the improvement in wrench purported to be described in said patent is sufficiently stated in the single claim thereof, viz:

“A wrench comprising a handle having a bifurcated shank, a socket support having one end mounted and pivotally secured between the branches of the shank bifurcations and the other end squared, a nut engaging socket having a squared bore adapted to slidably receive the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions.”

2. That the patentee Samuel Eagle assigned to John William Langs an undivided one-half interest in his alleged [23] invention and letters patent; that the patentee together with said Langs gave to the Plomb Tool Company an exclusive license to manufacture and sell wrenches embodying said improvement thruout the United States, and the Plomb Tool Company extensively advertised and sold wrenches embodying said improvement.

3. That the file wrapper of said patent cites the following prior art:

Mandeville	348,565	September 7, 1886
Helstrom	1,168,204	January 11, 1916
Miottel	1,169,987	February 1, 1916
Baltzley	1,209,658	December 26, 1916

And furthermore, long prior to Eagle's patent there had grown up the use of wrenches provided with interchangeable standard stockets, such as used in connection with said Eagle wrench.

4. That it appears from said file wrapper that, according to the judgment of the Patent Office, the only difference between said cited prior patents and said purported improvement was that in Eagle's wrench the socket support is adapted to be held in various positions with respect to the handle. That such feature is, however, fully described and shown by the prior patent to J. W. Edmands, No. 820,185, dated May 8, 1906 for Tool, which patent the Patent Office apparently failed to find; at all events, failed to cite, as appears from said file wrapper. And the Court is of the opinion that had the Patent Office found said Edmands patent, it would or should have rejected the application for the patent in suit.

5. That the Patent Office further failed to cite the prior patent to M. J. Fairchild, No. 1,292,285, dated January 21, 1919 for Socket Wrench. That the substance of all elements comprising the alleged combination purported to be described by said Eagle's patent is found in said prior patents; and the assembly of devices and features taken from said prior art into a wrench as described by said Eagle's patent was within the skill of any mechanic versed in the art, and produced only [24] the expected and obvious results attributable to such selection and assembly; and therefore the alleged improvement in Wrench purported to be described and claimed in the patent in suit does not constitute invention.

And the Court finds as its **CONCLUSION OF LAW** that since the improvement in wrench described and claimed by the patent in suit does not constitute invention, said patent is invalid

and void, and the Bill of Complaint for that reason should be dismissed with costs to the defendant.

May 29th, 1933.

JAMES ALGER FEE
U. S. District Judge.

[Endorsed]: Filed May 29, 1933. [25]

AND AFTERWARDS, to wit on Monday, the 29th day of May, 1933, the same being the 71st judicial day of the Regular March Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [26]

In the United States District Court for the District of Oregon

Equity No. 9154

SAMUEL EAGLE, JOHN WILLIAM LANGS, and PLOMB
TOOL COMPANY,

Plaintiffs

vs.

P & C HAND FORGED TOOL COMPANY, a corporation
Defendant

FINAL DECREE

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof the Court made its findings of fact and conclusion of law and entered the same of record; and thereupon it is now

ORDERED, ADJUDGED and DECREED as follows:

That the alleged improvement purported to be described and claimed in the patent sued on, namely, to Samuel Eagle, No.

1,380,643, dated June 7, 1921 for Wrench, does not constitute invention and that therefore the said patent is invalid and void.

And it is further ORDERED, ADJUDGED and DECREED that the Bill of Complaint be, and the same is hereby dismissed, and that the defendant have and recover its costs and disbursements in this suit amounting to the sum of \$101.40 as taxed by the Clerk of this Court.

Dated May 29th, 1933.

JAMES ALGER FEE
U. S. District Judge.

[Endorsed]: Filed May 29, 1933. [27]

AND AFTERWARDS, to wit, on Monday, the 5th day of June, 1933, the same being the 76th judicial day of the Regular March Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [28]

[Title of Cause.]

Now at this day upon motion of Mr. Lamar Tooze, of counsel for the plaintiffs,

IT IS ORDERED that they be and are hereby allowed to file a petition for rehearing herein. [29]

AND AFTERWARDS, to wit, on the 23rd day of June, 1933, there was duly filed in said Court, a Petition for Rehearing, in words and figures as follows, to wit: [30]

[Title of Court and Cause.]

PETITION FOR REHEARING

Come the plaintiffs and respectfully petition for a rehearing in the above-entitled cause on the ground and for the reasons:

I.

That the Court erred in holding and deciding that the single claim contained in the United States Patent No. 1,380,643, granted June 7, 1921, to Samuel Eagle, which is the patent litigated herein, must be held invalid upon the references cited and upon the examples of the purported prior art submitted by the defendant.

II.

That the Court erred in holding and deciding that the fact that several of the elements set out in said claim are old and that several subcombinations of said element are old, and therefore the single claim of said patent must be construed to have very narrow scope, or to be construed to be of doubtful validity.

III.

That the Court erred in holding and deciding that the Patent Office made a finding that "The socket support of plaintiff's claim with the squared end is equivalent to an element in the [31] Mandeville Patent consisting of a shank provided with a square nut-receiving chamber, and also is equivalent to the element in the Miottel Patent shown as a recessed socket support. In other words the squared male element was held an equivalent of the recessed female element."

IV.

That the Court erred in holding and deciding that the effect of a preliminary action of the Patent Office, which preliminary

action was modified or set aside by a following final or different action, can have any binding or persuasive effect upon this Court in construing said patent.

V.

That the Court erred in holding and deciding that the final statement of the applicant, who was later the patentee of the patent involved in this litigation, did not succinctly point out the exact patentable features involved in his patented invention, namely:

“The two claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end pivotally secured to the handle, and the other end adapted to be slidably received in the bore of the nut engaging socket.” With this construction applicant needs no fastening means for holding the socket support and the socket together, depending merely upon the frictional engagement between the parts.

“The references also fail to disclose a socket support or a socket assembled together and held against relative pivotal movement, the socket support being pivotally secured onto the handle and adapted to be held at various positions with respect thereto.”

It is to be noted that the underlining is not included in the citation but is added for the purpose of emphasis in this petition.

VI.

That the Court erred in holding and deciding that the Edmands Patent, which was not cited as a reference by the

Patent [32] Office but was cited by defendant as a purported example of the prior art, shows any feature or element not shown in the references cited by the examiner, or that defendant contends that said Edmands Patent shows any feature or element not thus shown; that is, that said patent cited by defendant is a disclosure of anything not shown in the references relied upon by the examiner when acting upon the Eagle application.

VII.

That the Court erred in holding and deciding that the specific feature “The Edmands patent has the same features except that the socket support and the socket itself are in one piece and are adapted to be removed from the pivot pin when the eye is opposite to one edge of the lug,” underlining not being present in the Court’s opinion but being included in this petition for the purpose of emphasis, does not constitute that quality of invention to lend patentability to plaintiff’s advancement in the art to which said patent is directed.

VIII.

That the Court erred in holding and deciding that the fact that in some operations or uses of the two wrenches, namely the Eagle wrench and the Edmands wrench, which are being compared, are similar, is not controlling because there are other new results not attainable by the use of the Edmands wrench, these results being

1. The Eagle wrench is adapted to accommodate a number of wrench sizes and said accommodation is permitted by the use of standard sockets, which are removable from their socket supports, while in the Edmands wrench said accommodation is possible only by the use of a number of integral wrench heads, each

of which wrench heads will drop off in one position, and thus the Edmands wrench is not a one-handed wrench for the reason that one hand must be used in said position to hold said wrench head in place [33] upon its handle; that if the eye of a particular wrench head is closed to make it pivotally secured to the handle, it is not capable of being removed for the purpose of substitution, which is the principal purpose of the Edmands invention and which is the only purpose which would tend to give it any commercial value whatsoever.

2. The Edmands wrench is not adapted to accommodate standard sockets, but said wrench heads being integral structures must necessarily command a higher price and involve special manufacturing tools and processes.

IX.

That the Court erred in holding and deciding that the widespread use of standard sockets followed the date of the Edmands patent in 1906 rather than preceded it.

X.

The Court erred in holding and deciding that the steps taken by the patentee Eagle were apparent and were the result of a need sprung up and which was easily and quickly solved, said holding decision being contrary to the undisputed testimony that the Plomb Tool Company, one of the plaintiffs, spent years in attempting to solve this problem and the witness Carlborg who was in the employ of the defendant corporation at the inception of the infringing manufacture and sale complained of in the complaint, could not duplicate the Eagle wrench even after it had been illustrated to him.

Plaintiffs further petition the Court to permit said petition to be heard and supported by oral argument.

Respectfully submitted,

CAKE & CAKE

JAUREGUY & TOOZE

W. E. RAMSEY

Attorneys for Plaintiffs.

[Endorsed]: Filed June 23, 1933. [34]

AND AFTERWARDS, to wit, on Monday, the 7th day of August, 1933, the same being the 29th judicial day of the Regular July Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [35]

[Title of Cause.]

This cause was heard by the court upon the petition of the plaintiffs for a re-hearing and upon the objections of the plaintiffs to the cost bill filed by the defendant herein, and was argued by Mr. W. E. Ramsey, of counsel for the plaintiffs and by Mr. T. J. Geisler, of counsel for the defendant. Upon consideration whereof,

IT IS ORDERED that the petition for a re-hearing be and the same is hereby denied, and that the objections to the cost bill be and the same are hereby overruled, except the item of \$18.00 for the cost of making models which is disallowed. [36]

AND AFTERWARDS, to wit, on the 6th day of November, 1933, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit: [37]

[Title of Court and Cause.]

PETITION ON APPEAL.

The above named Samuel Eagle, John William Langs and Plomb Tool Company, the latter being a corporation, conceiving themselves aggrieved by the decree made and entered in the above entitled cause on the 29th day of May, 1933, and adhered to in the order denying the petition for re-hearing thereon, made and entered herein on the 7th day of August, 1933, whereby this court did adjudge and decree that claim one of the letters patent of The United States granted to Samuel Eagle June 7, 1921, number 1,380,643, for an improvement in Wrenches and assigned in part to the plaintiff John William Langs and subject to an exclusive license to the plaintiff Plomb Tool Company, a corporation, did not involve invention and that the said claim is void; said decree furthermore dismissing the bill of complaint herein with costs to the defendant, therefore, the plaintiffs and each of them do hereby appeal from said decree and each and every part thereof and from the order denying a rehearing thereof, for the reasons set forth in the assignments of error filed herewith, to The United States Circuit Court of Appeals for the Ninth Circuit, and pray that this appeal may be allowed, that a citation be issued directed to the above named defendant, P & C Hand Forged Tool Company, a corporation, commanding it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain [38] to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said decree and order were made, duly authenticated, be sent to said Circuit

Court of Appeals for the Ninth Circuit together with the exhibits in this case.

Dated this 4th day of November, 1933.

WM. M. CAKE of
CAKE & CAKE
LAMAR TOOZE of
JAUREGUY & TOOZE
W. E. RAMSEY

Solicitors for Plaintiffs.

Service of the above and receipt of a copy thereof duly certified to be a correct copy by Lamar Tooze, of solicitors for plaintiffs is hereby admitted this 6th day of November, 1933.

T. J. GEISLER

Solicitor for Defendant.

[Endorsed]: Filed November 6, 1933. [39]

AND AFTERWARDS, to wit, on the 6th day of November, 1933, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit: [40]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Come now the above named plaintiffs, Samuel Eagle, John William Langs, and Plomb Tool Company, a corporation, and each of them, by their solicitors, and say that the decree heretofore rendered in the above entitled cause on the 29th day of May, 1933 and the order entered on the 7th day of August, 1933, denying plaintiffs' petition for rehearing, respectively are erroneous and against the just rights of said plaintiffs for the following reasons:

I.

Because the District Court adjudged and decreed that the improvement described and claimed in claim one in the letters patent of the United States granted to Samuel Eagle June 7, 1921, number 1,380,643, for an improvement in Wrenches, and in which patent plaintiff John William Langs holds an undivided interest and in which patent the Plomb Tool Company holds an exclusive license, did not involve invention and that said claim is invalid and void.

II.

Because the District Court failed and refused to adjudge and decree that said Samuel Eagle invented a new, useful and patentable improvement in Wrenches, duly defined and claimed in said claim one of said letters patent. [41]

III.

Because the District Court erred in not adjudging and decreeing that said claim of said letters patent is valid, that the defendant infringed the same, and that the plaintiffs in their respective relations under said letters patent are entitled to relief from said infringement as prayed for in the bill herein.

IV.

Because the said decree of the District Court is in prejudice of the substantial rights and equities of the Plaintiffs in the premises.

Dated November 4th, 1933.

CAKE & CAKE
JAUREGUY & TOOZE
W. ELMER RAMSEY
Solicitors for Plaintiffs.

[Endorsed]: Filed November 6, 1933. [42]

AND AFTERWARDS, to wit, on Monday, the 6th day of November, 1933, the same being the 1st judicial day of the Regular November Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [43]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On motion of solicitors for the above named plaintiffs, it is ORDERED, that the appeal presented by the plaintiffs herein be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in the above entitled case on the 29th day of May, 1933, and the order made and entered herein on the 7th day of August, 1933 denying plaintiffs a rehearing with respect to the decree of this Court entered on the 29th day of May, 1933, decreeing that the single claim of the patent sued upon is void and dismissing the bill of complaint; and it is ordered that a transcript of the record proceedings and papers upon which said decrees were made, duly authenticated, and the exhibits submitted in said cause be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of practice.

It is further ORDERED that the plaintiffs file a bond to be approved by this Court in the sum of \$500.00 to answer all costs which may be adjudged or awarded against plaintiffs, or any of them, if they shall fail to prosecute their appeal to effect, and shall fail to sustain their appeal.

It is further ORDERED that a citation be issued admonishing the defendant to be and appear in the United States Circuit

Court [44] of Appeals for the Ninth Circuit within thirty (30) days from the date of said citation.

Dated this sixth day of November, 1933.

JAMES ALGER FEE
U. S. District Judge.

[Endorsed]: Filed November 6, 1933 [45]

AND AFTERWARDS, to wit, on the 5th day of December, 1933, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [46]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS that we, Samuel Eagle, John William Langs and Plomb Tool Company, a corporation, as principals, and AMERICAN SURETY COMPANY OF NEW YORK as surety, are held and firmly bound unto the above-named defendant P & C Hand Forged Tool Company, a corporation, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said P & C Hand Forged Tool Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Signed with our seals and dated this 4th day of December, 1933.

WHEREAS, lately at a District Court of the United States for the District of Oregon in a suit pending in said Court between Samuel Eagle, John William Langs, and Plomb Tool

Company, a corporation, as plaintiffs, and P & C Hand Forged Tool Company, a corporation, as defendant, a decree was rendered against the said plaintiffs and each of them and the said plaintiffs having obtained an appeal and filed a notice and secured an order allowing said appeal, and a citation directed to said P & C Hand Forged Tool Company, a corporation, citing and admonishing it to be and appear at a session of the [47] United States District Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, in said Circuit within thirty days from the 6th day of November, 1933.

Now, the condition of the above obligation is such that if the said plaintiffs, Samuel Eagle, John William Langs, and Plomb Tool Company, a corporation, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation is to be void; else said obligation is to remain in full force and virtue.

SAMUEL EAGLE

JOHN WILLIAM LANGS

By Stewart S. Tufts

his attorney in fact

PLOMB TOOL COMPANY

By W. M. Cake, its attorney,

Principals.

AMERICAN SURETY COMPANY

OF NEW YORK

By W. A. King

Resident Vice President

Surety.

Attest:

T. GRAHAM

Resident Asst. Secretary

W. A. KING

Resident Agent

Sealed and delivered in the presence of:

HALBERT MENYUS

As to execution by

EAGLE and TUFTS

at attorney for Langs

The foregoing bond on appeal is hereby approved this 5th day of December, 1933.

JAMES ALGER FEE

U. S. District Judge.

[Endorsed]: Filed December 5, 1933. [48]

AND AFTERWARDS, to wit, on the 16th day of February, 1934, there was duly filed in said Court, a Statement of the Evidence in words and figures as follows, to wit: [49]

[Title of Court and Cause.]

STIPULATION AND ORDER.

In the following Statement of Evidence, certain portions are set forth in full, that is, not stated in narrative form. The parties hereto desire that said testimony shall be set forth in full in said statement of evidence, inasmuch as said testimony is expert testimony or quasi-expert testimony, statements of Court or counsel made at the time of trial, and the exact words are deemed essential to obtain a correct understanding of the testimony, objections and rulings with relation thereto, and the portions set

out in full are believed to be matters specifically excepted by Equity Rule 75, as amended.

CAKE & CAKE

JAUREGUY & TOOZE

W. E. RAMSEY

Attorneys for Plaintiffs.

T. J. GEISLER

Attorney for Defendant.

The portions of the evidence set forth in full and referred to in the above statement are incorporated in the Statement of Evidence by the direction of Court.

JAMES ALGER FEE

District Judge. [50]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

At the trial of the cause, a stipulation between the parties referring to certain issues made by the pleadings and matters of proof was offered and received in evidence and marked Plaintiffs' Exhibit 1. Plaintiff introduced the Eagle Patent (Plaintiffs' Exhibit 2), the original license agreement with Plomb Tool Company (Plaintiffs' Exhibit 3) and the assignment to plaintiff Langs (Plaintiffs' Exhibit 4).

The Plaintiff

SAMUEL EAGLE

was called as a witness on behalf of the Plaintiffs. Said witness testified that he is the Plaintiff and is the patentee of United States Patent No. 1,380,643 entitled Wrenches. He identified the patent, the license and assignment previously introduced as exhibits. He was handed one of the wrenches manufactured by the Plaintiff Plomb Tool Company (Plaintiffs' Exhibit 5)

331

308-645

PLAINTIFF'S EXHIBIT 2.

Filed July 11, 1932.
G. H. Marsh, Clerk.

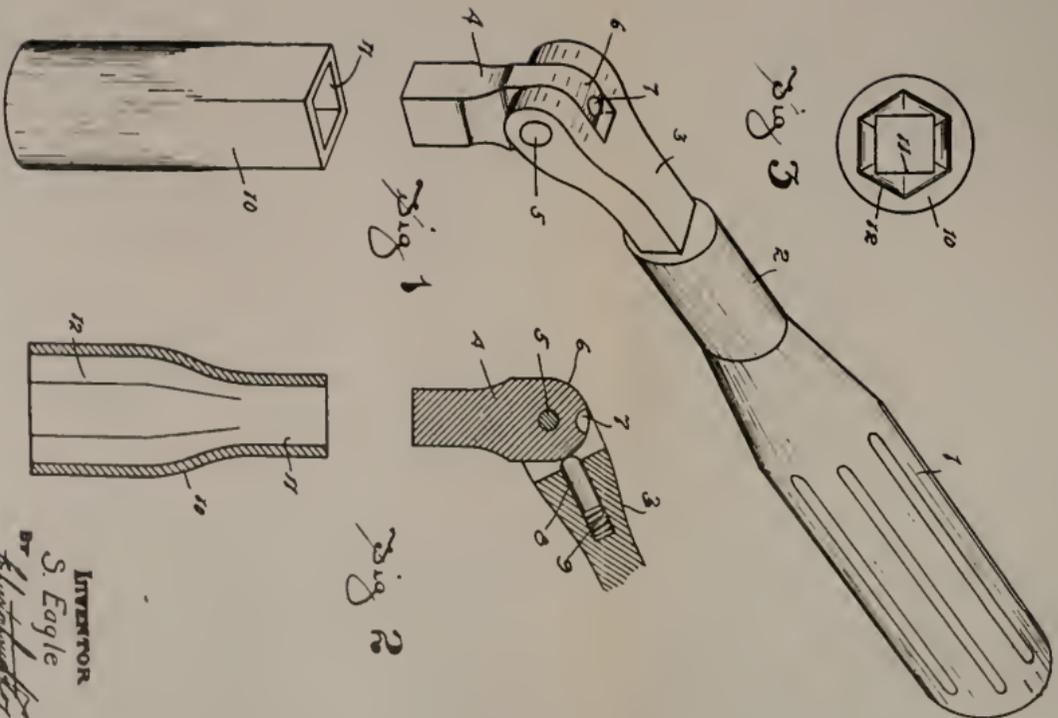
1,380,643.

S. EAGLE.

WRENCH.

APPLICATION FILED OCT. 13, 1920.

Patented June 7, 1921.



INVENTOR
S. Eagle
BY *S. Eagle*
ATTORNEY

UNITED STATES PATENT OFFICE.

SAMUEL EAGLE, OF GILBERT PLAINS, MANITOBA, CANADA

WRENCH.

1,380,643.

Specification of Letters Patent.

Patented June 7, 1921.

Application filed October 13, 1920. Serial No. 416,731.

To all whom it may concern:

Be it known that I, SAMUEL EAGLE, of the town of Gilbert Plains, in the Province of Manitoba, Canada, have invented certain new and useful Improvements in Wrenches, of which the following is the specification.

The invention relates to improvements in wrenches and particularly to socket wrenches and the principal object of the invention is to provide a simply constructed and inexpensive and durable wrench which can be easily and quickly attached to the usual socket and is arranged so that the handle can be brought to a position axially aligned with the socket or swung sidewise as occasion demands.

A further object is to arrange the wrench so that the handle can be releasably locked in its axial position.

With the above objects in view the invention consists essentially in the arrangement and construction of parts hereinafter more particularly described and later pointed out in the appended claim, reference being had to the accompanying drawing in which:—

Figure 1 is a perspective view of the complete wrench showing the head situated above the socket.

Fig. 2 is a sectional view through the head end of the wrench and also through the socket.

Fig. 3 is an inverted plan view of the socket.

In the drawing like characters of reference indicate corresponding parts in the several figures.

1 is the handle of the wrench which is suitably shaped for gripping purposes. One end of the handle is decreased in diameter as indicated at 2, and to this end I secure in any suitable manner a fixed shank 3, which has the forward end bifurcated or forked to receive the upper end of the head 4 which is pivotally fastened to the shank by a cross pin 5 passing through the forks.

The head has the lower end square in horizontal section and the upper end of the head is semi-circular as indicated at 6 and is provided at the top with a depression or indent 7 which is adapted to receive a catch 8 slidably mounted in the shank and normally pressed toward the head by the action of an inserted spring 9.

This latter arrangement is such that when the handle 1 is swung into a position axially aligned with the head the projecting end of the catch will enter the indent and have a tendency to lock the parts so positioned. The end of the catch is rounded so that upon pressure being brought on the handle the catch can be sprung out of the indent to release it to swing sidewise.

This tool is especially provided for use with wrench sockets 10 which have their upper ends squared as indicated at 11 to receive the square end of the head and their lower ends shaped to fit a nut. I might here state that this socket varies in practice depending upon the work and may have a hexagonal opening such as shown at 12 or any other sided opening depending on the type of nut 70 on which it is to be used.

A tool of this kind is particularly useful where one has to get under a machine to do the work, such as under an automobile. After having placed the socket on a nut one enters the head 4 in the socket with the handle straight and then by swinging the handle to the side can get considerable leverage to undo the nut.

In using the tool to start a nut the handle is brought to a position such that it is axially aligned with the socket and then by turning the handle around by a rolling action between the hands, the work can be easily accomplished.

What I claim as my invention is:—

A wrench comprising a handle having a bifurcated shank, a socket support having one end mounted and pivotally secured between the branches of the shank bifurcations and the other end squared, a nut engaging socket having a squared bore adapted to slidably receive the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions.

Signed at Winnipeg, this 23rd day of September, 1920.

SAMUEL EAGLE.

In the presence of—

GERALD S. ROXBURGH,
K. B. WAREFIELD.

(Testimony of Samuel Eagle.)

and also a wrench manufactured by the Defendant (Plaintiffs' Exhibit 6). He read the single claim contained in said patent and pointed out each of the elements set out in said claim with respect to Plaintiffs' Exhibits 5 and 6. Mr. Eagle testified that he manufactured 1,000 wrenches in 1920, and a few in 1921, and that said wrenches were scattered [51] over as wide a sales area as he could to advertise the same. A good many of said wrenches were sent to Toronto to be exhibited in the Toronto Automotive Equipment Show in Toronto in 1921. Others were sent to Winnipeg to be exhibited in the Automotive Equipment Show in 1921-22. A few were sold here and there through the West and thru the prairie provinces, some in Lethbridge, and whenever he could get a chance he sold one in The United States. At that time he was a resident of Gilbert Plains, Manitoba, Canada. He later moved to Lethbridge, Canada and to Revelstoke, Canada, and then to Haney, Canada and now lives in Ladner, Canada, of which city he is a resident and was at the time this suit was brought. Two of the wrenches sold in the United States during this period were sold to a man from Minneapolis, another one was sold to a Salt Lake City man, and samples were sent to different tool firms in the United States; namely, the Black Hawk Tool Company and the Snap-on Tool Company and some of said wrenches previously described were sold in the United States.

It was conceded by the Defendant that it had received proper legal notice of infringement prior to suit.

Upon Cross-examination

said witness Samuel Eagle testified that the wrench manufactured by the Plomb Tool Company (Plaintiffs' Exhibit 5) has a spring-controlled ball on one side of the socket support to keep

(Testimony of Samuel Eagle.)

the socket from slipping off of said socket support while the wrench illustrated in his patent does not have this feature and it is necessary to keep the socket from dropping off [52] in certain positions. Said witness further testified that the patent illustrated a spring-pressed pin for holding the socket support in various positions with relation to the handle, and he did not know whether the Defendant's wrench (Plaintiffs' Exhibit 6) had a spring-pressed ball for this purpose or not. His attention was called to a cut-away wrench (Defendant's Exhibit O), but said witness was unable to state whether Defendant manufactured a wrench identical to the cut-away portions of said exhibit or not.

On behalf of Plaintiffs,

M. B. PENDLETON,

general manager of the Plaintiff Plomb Tool Company, was called as a witness. He testified that his experience with tools commenced with his employment by the Plomb Tool Company in 1918 and that he had worked for said Company continuously ever since, beginning in the production department and working through the various departments of the business and in 1922 was made general manager of said Company; that he was familiar with the patent in suit and had examined said patent. The plaintiff Plomb Tool Company has manufactured between thirty-three and thirty-four thousand wrenches embodying the features of the Eagle patent.

“Q. Are you familiar with the wrenches which the Eagle patented wrench has displaced in use? [53]

(Testimony of M. B. Pendleton.)

“A. Yes. In the early days of my manufacturing experience we customarily manufactured for the garage trade, garage mechanics use, various types of solid handled wrenches, such as the L-wrench, the T-wrench, the solid speed handled wrench, and wrenches having various bends and shapes to get around natural obstructions in the repairing of an automobile.

“Q. Prior to your starting manufacture of the Eagle wrench, these wrenches took care of all the needs of the automobile mechanic, is that true?

“A. Yes, those were the wrenches that were necessary to perform the work that an automobile mechanic was required to do, and we made a very large number of these wrenches in various shapes and sizes; obviously every handle had its own socket as a part thereof, and there were a great many of the solid handled wrenches required to perform the work.

“Q. You say each handle had its own socket?

“A. As manufactured by us, they were all one-piece tools, with whatever shaped handle the case required, and with this opening attached thereto, to the solid piece.

“Q. Did you or did you not manufacture handles which were adapted to be used with sockets?

“A. Yes, we also manufactured handles to be used with sockets, and which were separate, yet the handles themselves had to follow the same general shape as did the original solid wrenches with handle and socket all in one.

“Q. When you speak of a T-wrench and an L-wrench you speak of the shape of the handle as they resemble a capital letter “L” or a capital letter “T”.

“Yes.

(Testimony of M. B. Pendleton.)

“Q. In your present manufacturing program what percentage of wrenches manufactured are of the Eagle type, and what percentage are of the fixed handle type?

“A. In reference to the handle in particular, the sockets being common to both, we are manufacturing more wrenches of the Eagle type than we are all of the other handles put together, and the acceptance of the Eagle type wrench by our trade has rendered obsolete a great quantity of the solid type wrenches referred to above. [54]

“Q. Do you know whether your experience as a manufacturer is the experience of other manufacturers, competitive manufacturers? Just answer yes or no.

“A. Yes.”

There are approximately sixteen other manufacturers competitive to the Plomb Tool Company making wrenches of both Eagle and other types, and this witness estimated that the annual manufactured volume of Eagle type wrenches would run somewhere in the neighborhood of 125,000 wrenches per year and that if the experience of other manufacturers is anything like the experience of Plomb Tool Company, that would be half of the wrench handle business offered to the automobile mechanic trade. This witness then explained why the Eagle type wrench has displaced the other type of wrenches as follows:

“A. The reason that the Eagle type of wrench has displaced the various types of solid handled wrenches, is because a mechanic with one Eagle type handle can perform most if not practically all of the jobs and operations which the other solid type handles perform, and obviously a mechanic will gladly buy one handle having a wide and varied use, rather than buy a collection of other type handles

(Testimony of M. B. Pendleton.)

which involves expense and inconvenience and duplication.”

The witness was then asked if he knew what number of special type wrenches was used prior to the introduction of the Eagle wrench and which the Eagle wrench displaced. This witness answered:

“A. Answering for our own company, we manufactured before we started the Eagle type wrench a volume of approximately equal to the volume of wrenches of the solid type that we are making today at the present time, and that volume has continued and particularly since we have conducted an active advertising campaign the Eagle type wrench has very much outstripped the sales of any other.

“Q. When you speak of the others, how many different types are there? [55]

“A. The other type handles, using that term differentiating from the Eagle type, comprise mostly L-handles, T-handles and speed handles, and another group which we call special purpose tools, which have a variety of bends to get around obstructions, and it was in those days the only way we knew how to make a wrench that the mechanic could perform certain jobs with.

“Q. Would a mechanic’s kit, or would it not, contain one of each of these types of wrenches?

“A. Formerly, yes.

“Q. At the present time what is the condition?

“A. At the present time the minimum requirements that a mechanic can get along with would be sockets of the various openings his work would require, plus a flexible handle of the Eagle type, plus possibly a ratchet.”

He further said that solid type wrenches include T-wrenches, L-wrenches and speed wrenches and also include a class of spe-

(Testimony of M. B. Pendleton.)

cial-purpose wrenches with various peculiar shapes for the jobs required. On cross-examination he further testified there is a wrench known to the trade as the universal wrench, which is a common wrench and moves in all directions for the purpose of turning a nut, the axis of which is arranged at an angle to the axis upon which the handle of the wrench is turned. He was then asked whether the universal wrench functioned in some cases the same as an Eagle wrench, such, for example, as getting at an out-of-the-way nut. His answer was:

“A. No. You misunderstand my answer. The universal wrench—or when a universal wrench is used, the axis around which the handle of the universal wrench rotates, is at an angle to the axis of the bolt on which the nut revolves. The two operations are entirely separate. To illustrate: The axis of the handle of the universal wrench is turning in this manner, whereas the axis of the bolt on which the nut turns, is vertical, and that work cannot be performed by an Eagle Type wrench.” [56]

He testified that one could not use the Eagle wrench for the same purpose that he could use the universal wrench, because the Eagle wrench moves in one plane only; that the universal wrench was in use some time prior to the knowledge of the Eagle patent and that the universal principle is many, many years older; that the universal wrench embodied two pivoted pieces to one of which a socket might be fastened, but that there was an intermediate movable piece to which a socket cannot be fastened.

The witness then testified that the special operating features of the Eagle wrench were that:

“A. The special features of the Eagle wrench comprise the simplest, most inexpensive to manufacture, least trouble

(Testimony of M. B. Pendleton.)

type of flexhandled wrench that has yet been conceived, and it makes possible the use of the handle in connection with sockets common to the automobile industry.

“Q. Referring to Plaintiff’s Exhibit 5, do you not consider the special feature in that wrench the fact that that part of the end of it pivoted to the handle, marked “4” in the patent, may be moved on its pivot laterally?

“A. Yes, that is an important feature, provided this part corresponding to “4” in the patent is pivotally secured to the handle in this manner.

“Q. Yes, that is what I mean. That is one of the important features then, it is pivotally secured to the handle. Is not another important feature the fact that there is a friction pin which holds that socket support (4) in different positions?

“A. Yes, it is also important that that friction device here in the handle will hold the part (4) in the patent in any one of the unnumerable number of positions.

“Q. Now you do not consider it important that the element (4) is made like a male connector. In other words it could just as well have a socket in place of a male connector there, couldn’t it?

“A. No, because the utility of the wrench for the purpose for which it is intended, that is, a tool for garage mechanics, would be materially reduced, and the utility of it would be materially reduced if this had a female connector.

“Q. A female connector? [57]

“A. A female socket on the end.

“Q. Your idea is, if we substitute for that male connec-

(Testimony of M. B. Pendleton.)

tor there a female connector, then the value of that wrench would be materially nullified. Is that it?

“A. Materially reduced, yes.

“Q. You consider an important feature in plain mechanics to change a piece from a male connector to a female connector in regard to a wrench?

“A. As far as the Eagle patent is concerned, to change this male connector to a female connector would materially reduce the utility.”

Mr. Pendleton then testified that the Plomb Tool Company had approximately sixteen competitors in the field at the present time, but that the Plomb Tool Company was one of the first to manufacture the Eagle type wrench, and since Plomb Tool Company had advertised the Eagle type of wrench extensively, quite a number of other manufacturers have also joined the field and manufacture this type of wrench in one way or another, and that said wrenches thus manufactured have been competitive to the Plomb Tool Company's product. Since starting manufacture of said Eagle type wrenches, said Plomb Tool Company has manufactured from 33,000 to 34,000 wrenches and that said Plomb Tool Company has spent between \$10,000 and \$12,000 in exploiting said wrench; that they have salesmen scattered throughout the United States and for strictly printed advertising in which this wrench is featured it spent between \$1,500 and \$2,000 per year, especially during the years 1930-31.

Mr. Pendleton testified on

Re-direct

and in answer to counsel's request that he differentiate the operating field or function of the flexhandle wrench which is described in the Eagle patent, the universal type wrench, and the

(Testimony of M. B. Pendleton.)

ratchet wrench. The witness testified that a universal type wrench is used for [58] driving a nut onto a bolt where the axis of the bolt is arranged at an oblique angle to the axis of the handle, but that this operation could not be performed with a flexhandle or Eagle type wrench. He summarized his reasons as follows:

“A. And in the flexhandled wrench, the driving of the nut in a clockwise direction, the handle has to make a complete circuit, and does not revolve about itself as in the case of the Universal wrench. The angle at which the handle is to vertical is immaterial, for the handle can revolve clear around the nut, or the flexhandled wrench may be put in a vertical position and turn between your hands in this manner, also revolving the nut. Now in the case of the ratchet wrench.”

Plaintiffs' counsel summarized the physical demonstration by stating:

“Q. May I make an explanation for the purpose of the record, of the technical terms, so the record will speak the demonstration which the plaintiff made, that in operating the flexhandle wrench the nut is rotated about an axis while one end of the wrench is fastend and makes a revolution about the same axis, being fastened to one end adjacent to the axis, and the other end being free. In the use of the universal wrench the handle and the socket both revolve about axes, which axes make an oblique angle with respect to each other, this being the demonstration which the witness has made.”

The witness stated that that is what he meant.

Plaintiffs' counsel then summarized the common use of the

(Testimony of M. B. Pendleton.)

ratchet wrench in the garage mechanic trade by stating that the wrench itself is moved about the socket or the nut and then reversed and another bite taken. The ratchet wrench is specifically employed where the handle must move thru a very small sector, the apex of which is the nut itself, and the handle describes a very small arc and moves back and forth, and said witness Pendleton testified that the function of said wrench was to tighten or loosen the nut as the case may be.

The witness testified that these wrenches can not be used interchangeably but each has its own specific usefulness, each functioning in its own field, and in most instances said [59] uses or functions do not overlap.

“Q. Now counsel asked you about the male service end, or the female service end of the Eagle wrench, and your answer was you felt that placing the female end would greatly reduce the use of it. Will you please explain in greater detail why this is so?”

“A. It would materially reduce the utility of the wrench to have a female end on this wrench, because that would require an adapter or some other joint to again reduce the female end to a male end so that mechanics generally who are equipped with sockets of which there is a universal use would then have a male connector to put in.

“A. In the absence of an adapter a flexhandle wrench with simply a female opening would necessitate as many flexhandle wrenches or as many size female openings as you have nuts on which you have to work, and you would then get back to the old solid handle type, which means separate wrench for separate nut size.”

(Testimony of M. B. Pendleton.)

Upon

Re-cross Examination

said witness Pendleton testified that it might be a mechanical choice for convenience of operation to make the moveable piece 4, which is the socket support of the Eagle wrench, either male or female, but that to make said socket as a female connection would be a very impractical expedient. The witness was asked:

“Q. Substituting one for the other is merely a mechanical selection?”

Mr. RAMSEY: I object to that question on the same ground I objected before. He is attempting to question this witness as an expert on patents; mechanical selection or mechanical choice and equivalents, are technical questions, and not one for which this witness is qualified.

COURT: Objection sustained. I think the former question was not this one.”

Plaintiffs then closed their case in chief. [60]

The defendant having previously given seasonable notice of the prior art offered, and there was received, in evidence the following patents:

Patent to Mandeville No. 348565, dated September 7, 1886, on combination tool, marked Defendant's Exhibit “C”;

Patent to Edmands No. 820185, granted May 8, 1906, marked Defendant's Exhibit “D”;

Patent to Miller No. 952435, dated March 15, 1910, marked Defendant's Exhibit “E”;

Patent to Helstrom No. 1168204, dated January 11, 1916, marked Defendant's Exhibit “F”;

I. J. MANDEVILLE

Combination Tool

No. 348,565

Sept. 7, 1886

DEFENDANT'S EXHIBIT "C"

Filed July 11, 1932.

G. H. Marsh, Clerk.

(No Model.)

I. J. MANDEVILLE.
COMBINATION TOOL.

No. 348,565.

Patented Sept. 7, 1886.

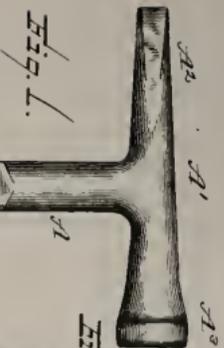


Fig. 1.



Fig. 2.

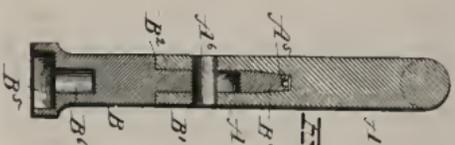


Fig. 3.

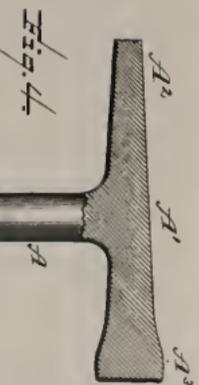
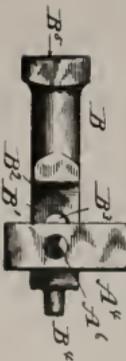


Fig. 4.



Witnesses
L. E. Mills
W. J. Small

Inventor
I. J. Mandeville
Geo. W. Brown
Attorney

UNITED STATES PATENT OFFICE.

IRA J. MANDEVILLE, OF HAZLETON, PENNSYLVANIA.

COMBINATION-TOOL.

SPECIFICATION forming part of Letters Patent No. 348,565, dated September 7, 1886.

Serial No. 20,118. (No model.)

Title of Invention.

It is known that I, IRA J. MANDEVILLE, a citizen of the United States, residing at Hazleton, in the county of Luzerne, State of Pennsylvania, have invented certain new and useful Improvements in Combination-Tools of which the following is a specification, reference being had therein to the accompanying drawings.

1 My invention relates to a combined socket-wrench, hammer, and screw driver, and my object is to provide a tool especially adapted for the use of stove-assemblys and repairers that shall be light, cheap, easy of manufacture, and convenient; and the invention consists in certain features of construction hereinafter specified, and particularly pointed out in the claims.

20 Referring to the drawings, Figure 1 is a side elevation of a combined tool constructed in accordance with my invention. Fig. 2 is a longitudinal section of a part of the same; and Fig. 3 is a like view, the section being taken at a right angle to that in Fig. 2. Fig. 4 is a side elevation, the wrench portion being shown in an open position.

Like letters indicate like parts in all the figures of the drawings.

30 A represents the body portion of my tool, which is formed with a T-head or handle portion, A', one extremity of which is formed in the shape of a screw driver, A'', and the opposite extremity is enlarged, forming a hammer-head, A'. The lower end of the body portion 35 A is bifurcated, as at A', and formed with a socket, A'. A wrench portion, B, is adapted to be received between the bifurcations A' of the body portion by being cut away to form a 40 shank, B', and shoulder B'. The shank may be, if desired, slightly wedge-shaped to be more firmly seated when forced in between the bifurcations A'. The shank is provided with an elongated slot, B'', through which and 45 the bifurcations A' a pin or rivet, A'', passes.

50 The top of the shank is formed with a lug, B', adapted to enter the socket, A'. In the handle, thus holding the wrench portion rigidly in the handle when used as a straight socket-wrench. The lower end of the wrench portion B is enlarged and provided with a square nut-receiving chamber or recess, B', and a cylindrical socket, B'', for receiving the screw threaded end of the bolt. Now, taking the tool in the position shown in Fig. 1, it is plain that it

55 may be either used as a screw driver, a hammer, or a straight socket-wrench and by drawing the wrench portion B down from without the bifurcations A' and turning it one side or the other a wrench is formed for the purpose 60 of getting at nuts, up under flanges and of other inconvenient places. To agitate close the wrench and put it in position for use as a hammer, screw driver, or straight socket-wrench, it is only necessary to swing the 65 wrench portion B down in line with the body portion and push it up into the bifurcations of said handle, the lug B' entering the socket A' therein.

The tool is especially adapted for stove-workmen or repairers, as by the different positions the wrench can be caused to assume and the combination of parts it will be found 70 convenient in many instances where ordinary tools would be awkward; but I do not limit the use of the invention to any particular. 75 If desired, the lug B' may be formed and used as an ordinary punch for perforating sheet metal or for heading rivets, the blows being applied upon the wrench end B'.

80 From the above description it will be seen that the tool may be either cast or wrought, as desired, and will be ready for use without any particular finishing of the parts thereof. Having described my invention and its operation, what I claim is—

85 1. A combination tool comprising a hammer-head and a screw-driver at one end and a socket-wrench at the other end, and a connecting handle formed of two sections pivoted to each other, whereby the handle may be disposed so as to present the socket wrench at 90 various angles to the handle, substantially as specified.

2. A combination-tool consisting of the hammer-head A', screw driver A'', and fixed 95 bifurcated handle-section A', and a movable handle-section, B, having the socket-wrench B', slot B'', and lug B', whereby the socket-wrench may be secured in line with the fixed 100 section of the handle, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

Witnesses:

JOHN A. BARTON,
C. BACHMAN.

IRA J. MANDEVILLE.

DEFENDANT'S EXHIBIT "D"

Filed July 11, 1932.
G. H. Marsh, Clerk.

J. W. EDMANDS.
TOOL.

APPLICATION FILED AUG. 4, 1904.

Fig. 2

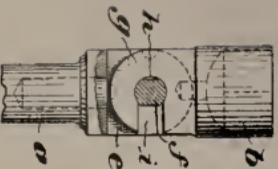


Fig. 1

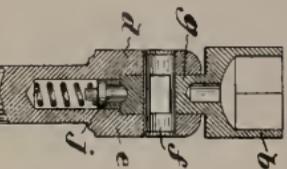


Fig. 3

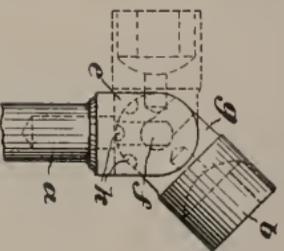
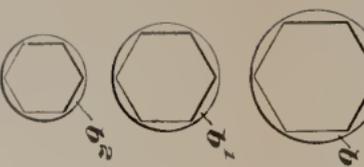


Fig. 4



a



Fig. 5

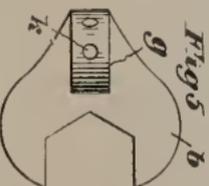
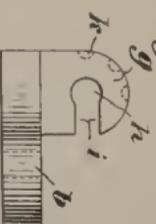


Fig. 6



Witnesses:
George O. Quastman
Ernest S. Emery.

Inventor:
John W. Edmands
by Emory Root, Attor.
Atty.

UNITED STATES PATENT OFFICE.

JOHN W. EDMANDS, OF NEWTON CENTER, MASSACHUSETTS.

TOOL.

No. 820,185.

Specification of Letters Patent.

Patented May 8, 1906.

Application filed August 4, 1904. Serial No. 219,573.

To all whom it may concern:

Be it known that I, JOHN W. EDMANDS, a citizen of the United States, residing at Newton Center, in the county of Middlesex and State of Massachusetts, have invented an improvement in Tools, of which the following description, in connection with the accompanying drawings, is a specification, like letters on the drawings representing like parts.

10 My invention consists in improvements in tools or implements, being more particularly though not exclusively concerned with such tools as wrenches or the like.

I have herein illustrated one embodiment of my invention and have for the purposes of illustration shown the same as applied to a novel construction of socket-wrench, wherein there is employed a holding member provided with an adjustable and removable socket member.

20 My invention will be best understood by reference to the following specification when taken in connection with the accompanying illustration of one selected embodiment thereof, while its scope will be more particularly pointed out in the appended claims.

Referring to the drawings, Figure 1 is a longitudinal sectional view of the illustrated embodiment of my invention. Fig. 2 is a plan view of the wrench shown in Fig. 1 with one of the holder-ears and the wrench-handle broken away. Fig. 3 is a view similar to Fig. 2 without the removal of the holder-ear and with the wrench member shown adjusted to a different position. Fig. 4 shows in end view a series of replaceable socket members, and Figs. 5 and 6 are details of a fork wrench member which may be applied to the holder shown in Fig. 1.

40 Referring to the drawings and to the illustrated embodiment of my invention therein, I have shown a tool or implement, herein a socket-wrench, consisting of the holding member or handle *a* and the removable and adjustable wrench-head or socket member *b*. The shank of the handle is provided with a pin *c*, which permits the tool to be readily turned or twisted when grasped by the hand. The tip of the handle is provided with a pair of ears *d* and *e*, between which extends the pin *f*, rigidly secured thereto.

The socket member *b* has a hook-shaped lug *g*, which fits between the holder-ears, the

said lug being provided with a circular eye *h*, having a narrowed mouth *i* extending to the edge of the lug upon one side of its axial center. The sides of the pin *f* are slabbled off lengthwise the handle to fit the mouth *i* of the lug *g*, so that by holding the socket member at substantially right angles to the handle upon one side of its axial center, as shown by dotted lines, Fig. 3, the mouth of the lug may be slipped over the slabbled-off portion of the pin and the socket member then turned about the pin, being retained by the same between the ears of the holder in the other positions to which it may be turned.

The socket member is held for use in any selected position of adjustment upon the holding member by means of the spring-pressed pin *j*, located in the shank of the holding member between the said ears and adapted to engage with any one of a series of holes *k*, arranged from its axial center toward the nut-engaging portion in the opposing edge of the lug *g*. When in use, the wrench head or member may be set to any desired angular position upon one side of its axial center relatively to the handle—such, for example, as that shown either in Fig. 2 or 3—and there retained by the pin *j*. The latter, if desired, may be proportioned to act as a latch to hold the wrench-head in its selected position of adjustment and require manual or other positive withdrawal, such as might be effected by a lug projecting on the pin through a slot in the handle to effect an unlatching of the head for removal or adjustment to a new position. In the wrench illustrated, however, the holes *k* are shown as comparatively shallow, and the tip of the pin is rounded, permitting the wrench-head to be readily snapped from one position to another by manual pressure only, which acts to force the pin out of its hole in the lug.

It will be observed that the axis of the wrench-head—that is, the axis about which the same is turned when in use—is substantially parallel with the planes of the engaging faces upon the holder-ears *d* and *e* and lug *g*. These faces, therefore, receive substantially all the torsional strain arising from the use of the wrench, and the pin *f*, which receives substantially no strain from this cause, may be made small and light, acting effectively as a locating means for the head,

C. MILLER

Socket Wrench

No. 952,435

March 15, 1910

DEFENDANT'S EXHIBIT "E"

Filed July 11, 1932.

G. H. Marsh, Clerk.

952,435.

C. MILLER,
SOCKET WRENCH.

APPLICATION FILED MAR. 30, 1909.

Patented Mar. 15, 1910.

2 SHEETS—SHEET 2.

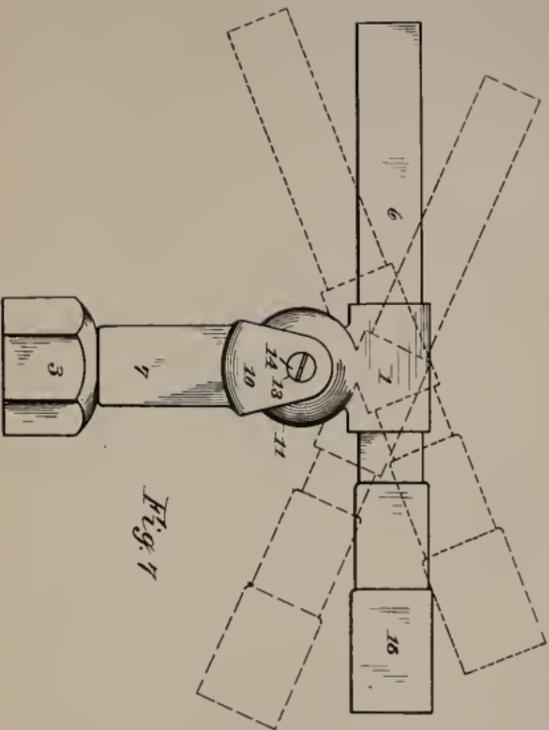


Fig. 7



Fig. 8



Fig. 9

WITNESSES
E. S. King
Wm. H. Miller &

INVENTOR
Charles Miller
BY E. S. King
ATTORNEYS.

SOCKET-WRENCH.

952,435.

Specification of Letters Patent.

Patented Mar. 15, 1910.

Application filed March 20, 1909. Serial No. 484,813.

To all whom it may concern:

Be it known that I, CHARLES MILLER, a citizen of the United States, and resident of Syracuse, in the county of Onondaga, in the State of New York, have invented new and useful Improvements in Socket-Wrenches, of which the following, taken in connection with the accompanying drawings, is a full, clear, and exact description.

10 This invention relates to the class of socket-wrenches embodying a holder adapted to receive a stem provided with a socket designed to be applied to a nut or other similar shaped object required to be turned, said stem being detachable so as to permit the use of stems having different sized sockets, and the holder having a handle or bar connected to it for turning the same.

One of the objects of the present invention is to provide a wrench of the aforesaid character which will permit the handle to be set at different angles in relation to the holder in order that the handle may clear obstacles which might otherwise tend to interfere with its operation in some instances.

Another object of the invention is to produce a wrench having interchangeable parts whereby its efficiency will be increased.

Other objects of the invention will be apparent from the novel arrangement and combination of the component parts of the socket-wrench hereinafter fully described and set forth in the claims.

In the accompanying drawings Figure 1 is a plan view of the socket-wrench constructed in accordance with my invention; Fig. 2 is a side view showing by dotted lines the adaptability of the handle to be swung to various positions; Fig. 3 shows the side of the wrench viewed reverse to Fig. 2; Fig. 4 is a longitudinal section on the line $x-x$ in Fig. 2; Fig. 5 is a transverse section on the line $y-y$ in Fig. 2; Fig. 6 is a transverse section on the line $z-z$ in Fig. 4; Fig. 7 is a side view of the wrench showing parts interchanged; Fig. 8 is a detached side view of the operating handle or bar; and Fig. 9 is a detached side view of the stem which is formed with the nut-socket.

Like characters of reference indicate like parts in the several views of the drawings. My improved wrench comprises a holder—1— which consists of a cast-metal sleeve 55 preferably formed square in cross-section

and adapted to receive a removable stem—2— formed with the well known socket—3— designed to be applied to a nut or similar shaped object required to be turned. This stem may be retained in the holder—1— by any suitable means, but preferably by an elongated spring-plate—4— secured in a longitudinal channel—5— provided in the holder, said plate being designed to secure the stem by frictional engagement therewith.

This wrench also comprises a handle—6— which essentially has a pivotal connection with the holder—1—. Said handle is hollow and is formed square in cross-section 70 and may be composed of steel or any other metal and is provided on its attaching end with a cast-metal sleeve—7— of corresponding shape in cross section, said handle being held detachably in the sleeve by frictional engagement with a spring-plate—8— suitably secured in a longitudinal channel—9— within the sleeve as shown in Figs. 2 and 6. This sleeve is formed with a socket—10— which receives a ball—11— formed 80 integral with the holder or sleeve—1—. Said ball is hollow and is provided with oppositely disposed openings—12—12— which are slightly elongated and coincide with circular apertures—13—13— provided 85 at opposite sides of the socket—10—, through which openings and apertures passes a pivot pin—14— whereby the aforesaid handle may be swung into various angles in relation to the holder—1—. This 90 pin is preferably of the form of a screw, therefore one of the apertures—13— is correspondingly threaded and the other aperture provided with a countersink for the reception of the screw-head as clearly illustrated in Fig. 4. The aforesaid apertures—12—12— are elongated for the purpose of allowing the ball—11— to be drawn into frictional contact with the socket—10— so as to retain the handle in the desired position. To effect this result I provide a bolt—15— which passes through a central opening—16— in the socket, and through a co- 100 including slot—17— in the ball, said bolt being formed with a screw-head—18—, 105 seated in a countersink of the opening. A nut—19— on the protruding end of the bolt is formed with a convex inner face to conform to the inner surface of the ball. It is obvious that by tightening the said nut the 110

ball will be firmly drawn into the socket for the purpose stated. The aforesaid slot —17— in the ball accommodates the bolt to permit the said ball to turn in its socket in-
 5 cident to the swinging of the handle as indicated. It will be observed that by providing the two members —1—7— of the same internal dimensions, the stem —2— and handle —6— may be interchangeably
 10 applied thereto, as shown in Fig. 7. This interchangeability of parts permits more extended use of the wrench.

I prefer to provide the free end of the handle —6— with a permanently attached sleeve —18— having a friction-plate —19—
 15 secured in an internal longitudinal channel —20— in said sleeve as shown in Figs. 2 and 4. By providing this sleeve —18— an additional section may be applied to the handle if required.

What I claim as my invention is:—
 1. A wrench of the class specified comprising a holder having a detachable nut-socket member, and an operating handle piv-
 25 otally and detachably connected to said holder, said nut-socket member and handle being interchangeable in their attachments as set forth.

2. A wrench of the class specified comprising a holder provided with a detachable nut-socket member and formed with a hol-
 30 low slotted ball, an operating handle provided with a socket member receiving said ball and having a loose pivotal connection therewith, and the socket member provided
 35 with an opening coinciding with the slot in the ball, and a bolt passing through the opening and slot and provided with means

shaped to conform to the interior of the ball for the purpose set forth.

3. A wrench of the class specified comprising a holder consisting of a sleeve for a nut-socket member, and formed with a hol-
 40 low slotted ball, a handle provided on one end with a detachable sleeve formed with a socket receiving said ball, and means pass-
 45 ing through the socket and into the ball for retaining said ball and socket in frictional connection as set forth.

4. A socket-wrench comprising a holder, a nut-socket member secured removably in
 50 the holder, a pivotal coupling for the handle and holder, said handle being detachable, and the nut-socket member and handle interchangeable in their connections
 55 as set forth and shown.

5. A socket-wrench comprising a holder formed with a hollow ball provided with
 60 oppositely disposed apertures, a nut-socket member formed with a stem secured detachably in said holder, a handle provided
 65 with a socket having apertures coinciding with the apertures of the ball, a pivot-pin fitted to the apertures of the socket and
 70 passing loosely through the apertures of the ball, whereby the handle is permitted to swing to different angles in relation to the
 aforesaid holder, and means for drawing
 75 said ball and its socket into frictional contact to sustain the handle in the required position as set forth.

CHARLES MILLER.

Witnesses:

JACOB R. BUCKENELEY,
 M. LAAS.

J. HELSTROM

Wrench

No. 1,168,204

January 11, 1916

DEFENDANT'S EXHIBIT "F"

Filed July 11, 1932.

G. H. Marsh, Clerk.

J. HELSTROM.

WRENCH.

APPLICATION FILED NOV. 3, 1913.

1,168,204.

Patented Jan. 11, 1916.

Fig. 1.

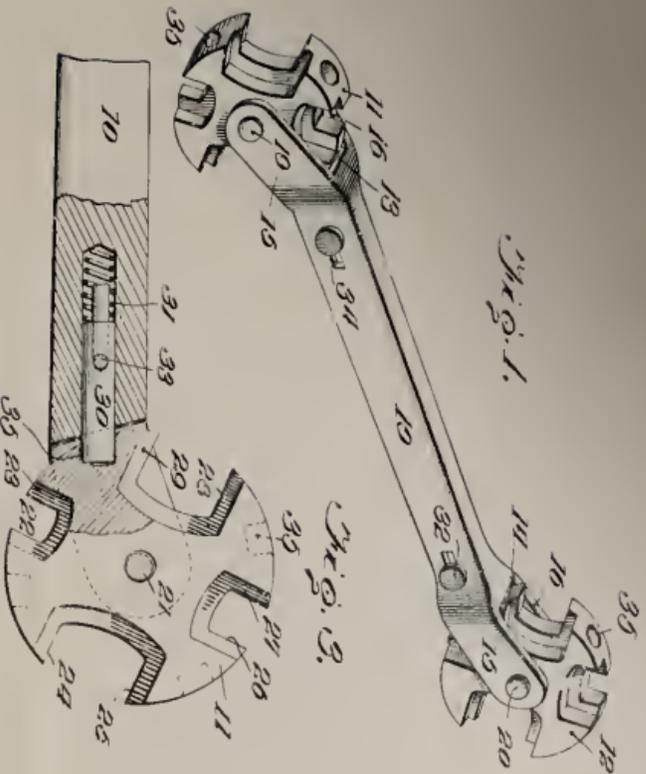
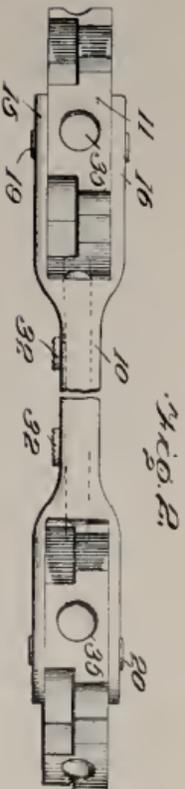


Fig. 2.



Witnesses

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383y

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JOHN HELSTROM, OF MORRISTOWN, NEW JERSEY

WRENCH.

1,168,204.

Specification of Letters Patent.

Patented Jan. 11, 1916.

Application filed November 3, 1913. Serial No. 798,995.

To all whom it may concern:

Be it known that I, JOHN HELSTROM, citizen of the United States, residing at Morristown, in the county of Morris and State of New Jersey, have invented certain new and useful improvements in Wrenches, of which the following is a specification.

The subject matter of the present invention is directed to new and useful improvements in wrenches and has particular reference to those which are designed especially for use in connection with farm machinery and the like.

As its principal object, this invention aims to provide a wrench of the type specified consisting broadly in a double-ended handle and a pair of revoluble wrench heads which are journaled in the ends of the handle, the wrench heads being each formed with a plurality of nut receiving notches or jaws so that they may be employed in applying or removing nuts of any size within a reasonable range.

A further object is to provide a novel form of locking dog whereby the revoluble wrench heads may be readily and easily locked in adjusted position.

The above and additional objects are accomplished by such means as are illustrated in the accompanying drawings, described in the specification and then more particularly pointed out in the claims which are appended hereto and form a part of this application.

With reference to the drawings, wherein there has been illustrated the preferred embodiment of this invention as it is reduced to practice, and throughout the several views of which similar reference numerals designate corresponding parts, Figure 1 is a perspective view of the composite tool; Figure 2 is a top plan view; and Figure 3 is a detail view illustrating in longitudinal section the terminal of the wrench shank and one segment of the wrench head, disclosing particularly the manner in which the locking dog operates to hold the wrench head in adjusted position.

As most clearly shown in Fig. 1, the preferred form of this wrench includes the body or handle member 10 in each end of which is journaled a revoluble wrench head as indicated at 11 and 12.

The body or handle of the wrench, which will be hereinafter designated as an entirety by the numeral 10, is formed from a metallic

bar of tempered steel, cast iron or any other metal which may be found efficient for the uses to which the particular wrench is to be put. This handle is formed in the nature of an elongated bar, the terminals of which are oppositely bent or offset and bifurcated as at 13 and 14 to produce on each terminal a pair of spaced arms or forks 15 and 16. These members 15 and 16 are designed to receive between their adjacent faces the wrench heads 11 and 12 and are, for this purpose, terminally apertured in order to provide for the seating of the axles 19 and 20 on which the wrench heads are keyed as will be hereinafter more fully explained.

It may be well to explain at this point that the necessity for bending or offsetting the terminals of the handle 10, in opposite directions, arises out of the fact that it has been found to be inconvenient to apply the wrench heads when they are longitudinally aligned inasmuch as the inactive head is liable to engage against an adjacent portion of the structure to which the bolt is attached, thus operating against the efficient and convenient manipulation of the tool.

The wrench heads 11 and 12 which are, as previously stated, rotated at the terminals of the handle 10, are substantially identical in construction and it is deemed unnecessary therefore to describe only one of them in detail. The member 11 being chosen in this instance. The wrench head 11 consists essentially in a circular metallic disk which is relatively thick and is centrally provided with an aperture 21 which receives the axle 19. At four approximately spaced points in the periphery of the disk there are formed pairs of notches which are individually designated in Fig. 3 by the numerals 22 and 23, 24 and 25, 26 and 27, 28 and 29. As stated, a pair of notches is formed at each of the four points in the periphery of the wrench head. It will be noted, upon reference to Fig. 1, that the notches of each pair are of a different size and that the pairs of notches are also of a different size so that there are provided in the wrench head eight notches or nut receiving jaws of different dimensions. In forming the pairs of notches, four relatively small notches are cut from one face of the head, while four relatively large notches are cut from the other face of the head.

It will thus be seen by reference particularly to Figs. 1 and 2 that each wrench head

consists in reality in a metallic disk which includes a central portion receiving the axle or pin 19 or 20, as the case may be, and a plurality of substantially T-shaped segments which radiate from the central portion and define between their adjacent edges pairs of notches. Obviously, also the notches included between the adjacent terminals of the head portions of the T-shaped segments are of less size than the notches defined by the adjacent edges of the stem portions of the said T-shaped segments.

The foregoing disclosures will be particularly appreciated when reference is had to Fig. 1 in which is illustrated, as previously stated, a perspective view of a complete wrench. The wrench head 12 being substantially similar to the wrench head 11, above described, it will not be necessary to give a detailed description of this member, but it is desirable to mention that the notches or nut receiving jaws of the member 12 are all of varying dimensions and are also of different dimensions than the corresponding elements of the wrench head 11. It will thus be seen that while the present wrench includes only two revoluble wrench heads, provision is made for the reception of these two heads and of nuts of sixteen different sizes. In the preferred embodiment, the notches are so formed that they will accommodate nuts ranging from the quarter inch size to the one and one-quarter inch size, being adapted to receive five-sixteenths, three-eighths, seven-sixteenths, one-half inch nuts, etc.

It is of course obvious from the foregoing description that it is necessary to provide some means for holding the wrench heads in adjusted position so that any one of the several notches of each head may be held in fixed relation to the handle member. For this purpose, therefore, there is provided in each wrench handle 10 a locking dog 30. Each of these members 30 consists of an ordinary metal pin which is mounted for sliding movement in the longitudinally extending holes formed in the terminal of the handle as indicated at 31. Helical springs 60 are interposed between the inner ends of the holes and the adjacent terminal of the locking dogs so that the dogs will be constantly urged into engagement with the periphery of the wrench heads.

As a means for withdrawing the dogs from locking engagement with the wrench heads, each dog is equipped with a finger member 32, the shanks 33 of which extend through slots 34 which are formed in the handle and communicate with the holes 31. The terminals of the dogs are of course rounded or pointed so that they may move with ease into the radial holes 35 which are formed in the periphery of the wrench heads. It may be noted that these radial

holes are four in number in each wrench head, the purpose of such an arrangement in the horses being obvious.

Attention is now directed to the fact that the axis of each of the wrench heads is offset relative to the axis of the shank of the wrench. The work receiving notches in each of the wrench heads and the holes 35 therein are arranged in staggered relation so that each bore upon one side of each of the said wrench heads is diametrically offset relative to the corresponding notch upon the opposite side thereof. It will now be observed that the dogs 30 are shiftable axially of the shank of the wrench to selectively engage in said bores of the respective wrench heads so that consequently, leverage upon the shank of the wrench tending to rotate one of the heads when engaged with the work will be communicated through the said head in angularly disposed radial lines passing through the axis of the head and the notch thereof engaged with the work and the coaxing dog 30 respectively. Thus, at no time will the leverage upon the wrench head be communicated therethrough in discrete straight lines such as would tend to break the wrench head, its pivot, or shear the dog 30. Consequently, the peculiar arrangement disclosed of the several elements of the wrench contributes materially to the strength and durability of the structure.

In reduction to practice, it has been found that the form of this invention illustrated in the drawings, and referred to in the above description as the preferred embodiment, is the most efficient and practical; yet realizing that the conditions concurrent with the adoption of this device will necessarily vary, it is desired to emphasize the fact that various minor changes in details of construction, proportion and arrangement of parts may be resorted to, when required, without sacrificing any of the advantages of this invention, as defined in the appended claims.

What is claimed is:—

1. A wrench including a shank having offset fork arms, a revoluble wrench head mounted between the said arms with its axis offset relative to the axis of the shank, said wrench head being provided upon one side with a work receiving notch and upon its opposite side with a socket diametrically offset relative to the notch, and locking means for the wrench head shiftable axially of the shank, to project through one end thereof between said arms for engagement in said socket, whereby leverage upon the shank tending to rotate the head will be communicated through the head in angularly disposed radial lines passing through the axis of the head and through said notch and socket respectively.

2. A wrench including a shank having offset arms, a revoluble wrench head mounted

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between said arms with its axis offset relative to the axis of the shank, said wrench head upon one side being formed with a work engaging portion, and locking means for the head shiftable axially of the shank to project between the arms in engagement with the head upon its opposite side at a point diametrically offset relative to the work engaging portion of the head, whereby
5 10 leverage upon the shank tending to rotate

the head will be communicated through the head in angularly disposed radial lines passing through said work engaging portion and the said point respectively.

In testimony whereof I affix my signature 15 in presence of two witnesses.

JOHN HELSTROM. [L. s.]

Witnesses:

ELMER W. ROMINE,

H. LEO ROMINE.

E. R. MIOTTEL

Socket Wrench

No. 1,169,987

February 1, 1916

DEFENDANT'S EXHIBIT "G"

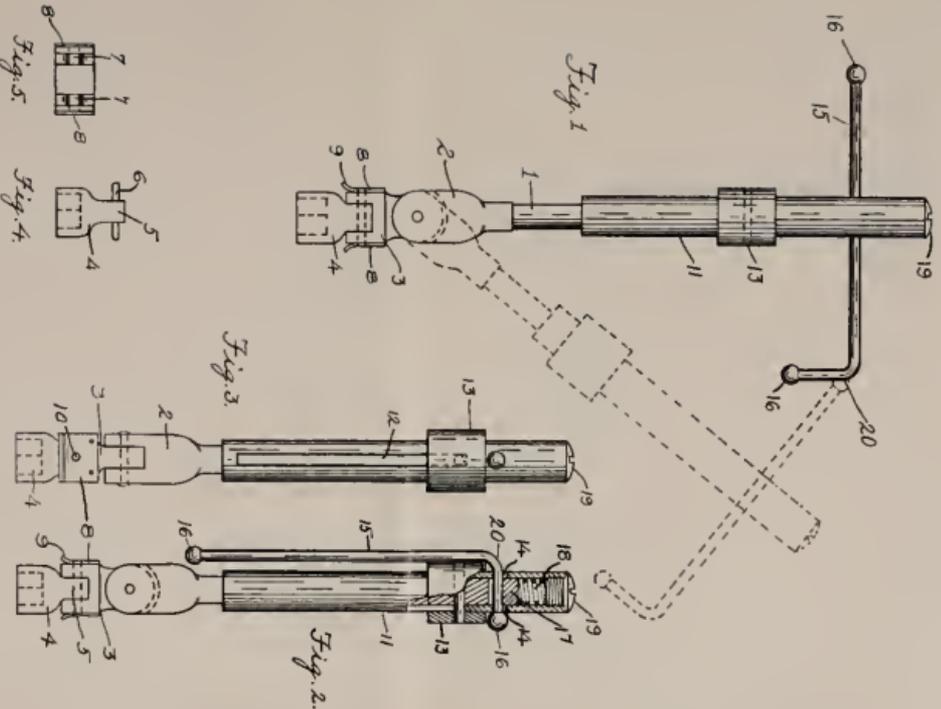
Filed July 11, 1932.

G. H. Marsh, Clerk.

1,169,987.

E. R. MOTTTEL,
SOCKET WRENCH.
APPLICATION FILED APR. 21, 1915.

Patented Feb. 1, 1916.



WITNESS
Emery Allison

357

INVENTOR
E. R. MOTTTEL

E. R. Motttel
ATTORNEY

UNITED STATES PATENT OFFICE.

EMILE R. MIOTTEL, OF DETROIT, MICHIGAN, ASSIGNOR OF SEVENTEEN ONE-HUNDREDTHS TO EDWARD F. HOFFMAN, SIXTEEN ONE-HUNDREDTHS TO HARRY F. HOFFMAN, AND SIXTEEN ONE-HUNDREDTHS TO ALFRED H. HOFFMAN.

SOCKET-WRENCH.

1,169,987.

Specification of Letters Patent.

Patented Feb. 1, 1916.

Application filed April 21, 1915. Serial No. 22,744.

To all whom it may concern:

Be it known that I, EMILE R. MIOTTEL, a citizen of the United States, residing at Detroit, county of Wayne, State of Michigan, have invented a certain new and useful improvement in Socket-Wrenches, and declare the following to be a full, clear, and exact description of the same, such as will enable others skilled in the art to which it pertains to make and use the same, reference being had to the accompanying drawings which form a part of this specification.

This invention relates to socket wrenches and an object of the invention is a wrench in which the socket or nut engaging head is pivotally mounted for universal movement relative to the shank whereby the device is adaptable for use in operating on nuts in positions inaccessible with an ordinary wrench.

A further object of the invention is a wrench of the character stated in which the sockets are readily interchangeable, springs being employed to hold the socket in its position relative to the handle.

A further object of the invention is a device in which the handle is longitudinally adjustable to enable the operator to manipulate nuts that are positioned at some distance from the outside of a mechanism, as an automobile engine mounted in a frame. By lengthening the handle the "reach" of the wrench is increased.

An additional object of the invention is a wrench of the character stated that may be folded or adjusted to small compass.

With these and other objects in view the invention consists in the construction and the novel arrangement of parts, as hereinafter more fully described and claimed and shown in the accompanying drawings in which—

Figure 1 is an elevation of a wrench embodying my invention showing the adaptability for operation at an angle with the longitudinal axis of the bolt and nut operated on. Fig. 2 is a view of the wrench when folded showing in detail the means employed in holding the operating or turning handle in position. Fig. 3 is a similar view showing the other side of the wrench. Fig. 4 is a side elevation of the socket employed with the wrench. Fig. 5 is a face view of the socket holder.

Similar characters, refer to similar parts throughout the drawing and specification.

The wrench consists preferably of a shank 1, having a bifurcated end 2 pivotally supported in which is a pivot socket 3 adapted at one end to receive the socket 4. As shown more clearly in Figs. 2 and 3, the pivot block or socket support 3 is also bifurcated to receive and pivotally support the tongue 5 of the socket 4. As shown in Fig. 4 this tongue 5 has secured thereto a pin 6, the ends of which are preferably rounded as shown and projecting equidistantly each way from the tongue. Each furcation of the socket support 3 is channeled or grooved at 7 to receive the ends of the pin 6 secured to the socket tongue, and to each furcation of the socket support 3 is secured a flat spring plate 8, the ends of which are curved outwardly as indicated at 9 to enable the socket tongue and pin to be pushed into place readily. The spring plates 8 are apertured at 10 in alignment with the grooves 7 so that, when the pin is seated in the said grooves, the plates spring back into contact with the sides of the socket support 3 and engage over the ends of the pin 6, thus retaining the socket in the support 3. By springing either of the plates shakewise slightly with the thumb or finger, the socket may be readily removed from the support.

By reason of the socket being pivoted in its support and the support pivoted to the shank, a universal joint is formed whereby the socket may be operated with the shank extending at an angle to the longitudinal axis thereof as indicated in Fig. 1, as will be readily understood by mechanics.

In order that the handle of the wrench may be lengthened for use in manipulating nuts in inaccessible positions, the shank is provided with a tubular, telescoping, extension 11. This extension is slotted upon opposite sides as indicated at 12 in Fig. 3, and at the extreme end of the shank a pin is inserted through the shank 1, through each of the slots 12, and a collar 13 embracing the tubular member 11. These parts are made to fit rather tightly so that some little friction exists between the parts whereby the said extension remains in the position placed and may be drawn out to its fullest extent as determined by the length of the slots or may be set in any intermediate po-

sition as may be desired. The tubular part 11 extends beyond the end of the shank 1 and is apertured at 14, 14, as shown to receive the turning handle or operating handle 15. This bar is provided with an enlargement 16 at each end to prevent its removal through the apertures 14. A retaining block 17 is also provided in the upper end of the tubular extension, grooved to engage the handle and held in frictional contact therewith by means of the coiled spring 18 retained in the extension by means of a screw 19 in threaded engagement with the end of the tubular extension. The handle 15 has a bent end portion 20 extending substantially at a right angle with the body of the handle and of such length that, when the bent portion is drawn through into the apertures 14 as shown in Fig. 2, the body of the handle lies adjacent to and parallel with the shank at which time the tubular extension may be slipped down onto the shank to close the wrench into the smallest possible compass.

From the foregoing description it becomes evident that the wrench is of simple form and construction and comparatively inexpensive to manufacture, that it is adaptable for use with a variety of sockets which are interchangeable and readily positioned in the support, and that the universal joint connection with the shank enables the device to be used in positions ordinarily inaccessible with wrenches of the ordinary type.

Having thus briefly described my invention and its utility, what I claim and desire to secure by Letters Patent of the United States is—

1. In a wrench, a shank, a socket support pivotally connected therewith, a socket having a pin secured thereto, the support being adapted to receive said pin providing a pivotal mounting for the socket at right angles to the pivotal mounting of the support, and spring retainers on the support adapted to engage said pin.

2. In a wrench, a shank having a bifurcated end, a bifurcated socket support hav-

ing a tongue pivotally mounted therein, a socket having a tongue engaging between functions of the support, a pin secured to said socket tongue, and spring retainers on the support adapted to engage the ends of the pin to detachably hold the socket in pivotal relation with the support.

3. A socket wrench comprising a shank having a bifurcated end, a bifurcated socket support pivotally mounted in the said bifurcated end, a socket having a tongue adapted to engage between functions of the support, a pin projecting from each side of the tongue of the socket, the ends of the functions of the support being grooved to receive said pin, and a pair of spring retainers on the support adapted to engage the pin and yieldably hold the socket in place.

4. A socket wrench comprising a shank having a bifurcated end, a bifurcated socket support pivotally mounted in the said bifurcated end, a socket having a tongue adapted to engage the functions of the support, a pin projecting from each side of the tongue of the socket, the ends of the functions of the support being grooved to receive the pin, and a pair of flat spring plates secured to the opposite sides of the support having apertures in alignment with the said groove adapted to engage the pin, said plates being curved at the free ends and the ends of the pin being rounded whereby the socket may be readily attached or detached from the spring.

5. A socket wrench comprising a shank, a socket having a universal joint connection therewith, a tubular extension in telescopic relation with the shank, said extension being slotted upon opposite sides, a collar engaging about the extension and secured to the shank by a pin passing through said slots, and a turning handle mounted in the extension adapted to be folded parallel with the said extension.

In testimony whereof, I sign this specification.

EMILE R. MOTTTEL.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

M. MILLER & A. D. BURG

Wrench

No. 1,175,973

March 21, 1916

DEFENDANT'S EXHIBIT "H"

Filed July 11, 1932.

G. H. Marsh, Clerk.

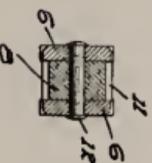
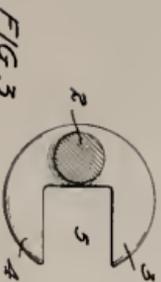
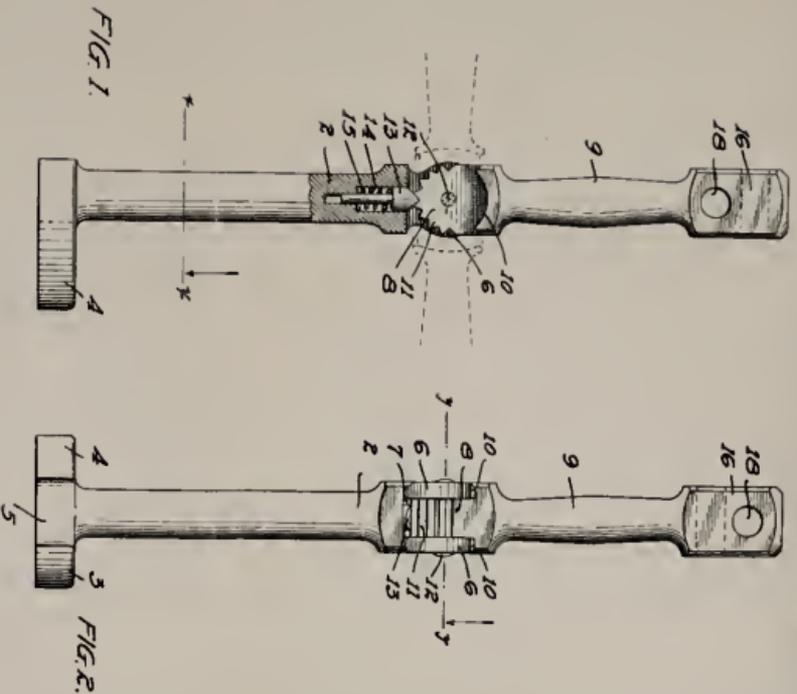
M. MILLER & A. D. BURG,

WRENCH.

APPLICATION FILED DEC. 2, 1915.

1,175,973.

Patented Mar. 21, 1916.



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BY Paul & Paul
ATTORNEYS

UNITED STATES PATENT OFFICE.

MELCHIOR MILLER AND ALFRED D. BURG, OF LE MARS, IOWA.

WRENCH.

1,175,973.

Specification of Letters Patent.

Patented Mar. 21, 1916.

Application filed December 2, 1915. Serial No. 64,725.

To all whom it may concern:

Be it known that we, MELCHIOR MILLER and ALFRED D. BURG, citizens of the United States, residents of Le Mars, county of Plymouth, State of Iowa, have invented certain new and useful Improvements in Wrenches, of which the following is a specification.

The object of our invention is to provide a wrench that will fit the bar or bolt-head at any angle.

A further object is to provide a wrench by means of which a bar or bolt in an almost inaccessible position can be easily reached and loosened or tightened.

A further object is to provide a wrench of simple, durable construction and one which will be comparatively inexpensive to manufacture.

The invention consists generally in various constructions and combinations, all as hereinafter described and particularly pointed out in the claims.

In the accompanying drawings forming part of this specification, Figure 1 is a side view of a wrench embodying our invention, partially in section, Fig. 2 is a view of the wrench, looking toward the opening between the jaws, Fig. 3 is a sectional view on the line $x-x$ of Fig. 1, Fig. 4 is a sectional view on the line $y-y$ of Fig. 2.

In the drawing, 2 represents the shank of the wrench, having jaws 3 and 4 formed thereon in a plane at right angles to the axis of the shank and having a socket 5 formed between them that is adapted to receive a bolt head or bar on which the wrench is used. We propose to provide wrenches of different sizes having sockets of varying width to adapt them for the different sizes of bars and bolts and preferably the wrenches will be sold in sets of a suitable number, with sufficient variation in the sockets to adapt the tools for all bars and bolts that may be encountered in a machine or vehicle.

The end of the shank 2 opposite the jaws has ears 6 formed thereon with a space 7 between them to receive a tongue 8 formed on the end of a handle 9 having shoulders 10 which are seated on the rounded ends of the ears. The tongue 8 has a curved surface provided with ratchet teeth 11 and a pin 12 passes through the ears 6 and through said tongue and secures the parts together. A latch 13 is mounted in a socket 14 in the

shank 2 and provided with a spring 15 which yieldingly holds the tapered end of the latch in engagement with the teeth of the ratchet. This handle 9 is free to swing through an arc of 180 degrees, as indicated by the full and dotted lines in Fig. 1, and may therefore be set at right angles to the shank 2 or in line therewith, or at any angle intermediate to the full and dotted line position. This adjustment of the handle adapts the wrench for a variety of uses. It may be thrust in between the spokes of a wheel or pulley and can be inserted in positions where it would be utterly impossible to use a wrench of the ordinary type.

The handle is preferably provided with an end portion 16 having holes 18 extending therethrough at right angles to one another into which a punch or other suitable article may be inserted for the purpose of forming an auxiliary handle when the handle proper is in alignment with the wrench shank. The ratchet device will hold the handle in its different adjusted positions and provides a flexible joint which permits the convenient movement of the handle either to the right or the left, according to the position in which it is desired to place the wrench jaws.

In various ways the details of construction herein shown and described may be modified and still be within the scope of our invention.

We claim as our invention:

1. A wrench comprising a shank having jaws formed thereon in a plane at right angles substantially to the axis of said shank, a handle hinged on the other end of said shank and provided with a hand grip, said handle having holes extending therethrough in which a supplementary handle may be inserted, the hinged connection of said handle with said shank permitting it to be adjusted at an angle thereto, and means for holding said handle in its adjusted positions.

2. A wrench comprising a shank having a substantially flat disk eccentrically mounted on one end of said shank in a plane at right angles substantially to the longitudinal axis of said shank, said disk having a recess in one side thereof extending inwardly to a point adjacent the center of said disk and the wall of said shank, the walls of said recess forming jaws for gripping a nut or bolt-head inserted into said recess, a

hand grip pivotally connected with the other end of said shank and free to swing to a position in alignment with said shank or angularly with respect thereto, and means for holding said hand grip in its adjusted position, for the purpose specified.

3. A wrench comprising a shank having a disk eccentrically mounted on one end of said shank in a plane at right angles substantially to the longitudinal axis of said shank, said disk having a recess in one side thereof extending inwardly to a point adjacent the center of said disk and the wall of said shank, the wall of said recess forming

15 jaws for gripping a nut or bolt-head inserted into said recess, a hand grip pivotally connected with the other end of said shank and free to swing to a position in alignment with said shank or angularly with respect thereto, for the purpose specified.

In witness whereof, we have hereunto set our hands this 27th day of November 1915.

MELCHIOR MILLER.
ALFRED D. BURG.

Witnesses:

J. T. KEENAN,
JANE PERRY.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

O. F. BALTZLEY

Tool

No. 1,209,658

Dec. 26, 1916

DEFENDANT'S EXHIBIT "I"

Filed July 11, 1932.

G. H. Marsh, Clerk.

O. F. BALTZLEY,
TOOL.

APPLICATION FILED FEB. 18, 1916.

1,209,658.

Patented Dec. 29, 1916.

Fig. 1.

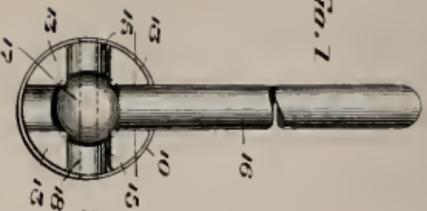


Fig. 2.

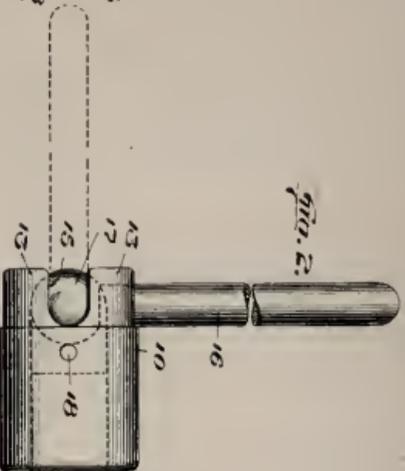


Fig. 3.

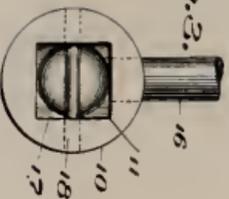


Fig. 4.

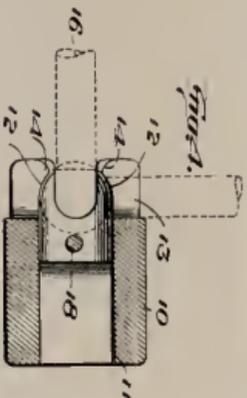


Fig. 5.

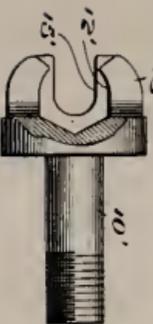
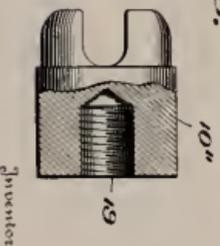


Fig. 6.



BY *Wm. H. Brown*
Attorney

O. F. Baltzley,
Inventor

UNITED STATES PATENT OFFICE.

OSEN F. BALTZLEY, OF HAGERSTOWN, MARYLAND.

TOOL.

1,209,058.

Specification of Letters Patent.

Patented Dec. 26, 1916.

Application filed February 19, 1916. Serial No. 79,086.

To all whom it may concern:

10 Be it known that I, OSEN F. BALTZLEY, a citizen of the United States, residing at Hagerstown, in the county of Washington, 5 and State of Maryland, have invented new and useful Improvements in Tools, of which the following is a specification.

This invention relates to tools wherein a rotatable member is provided with a handle 10 by means of which the rotatable member is adapted to be turned, step by step, or continuously rotated.

15 Objects of my invention are to provide a tool which is particularly adapted for use in construction or the like prevents the continuous movement of the rotatable member by means of the handle; to provide such a tool which is 20 especially durable, having the necessary strength and rigidity to resist any breaking or torsional strain exerted thereon; to provide a device which comprises substantially few parts, which may be manufactured at a 25 relatively low cost, and which may be assembled in a quick and ready manner.

The above and other objects of my invention are obtained in the structure described in the following specification and illustrated 30 in the accompanying drawing wherein—

30 Figure 1 is an end elevation of a wrench constructed in accordance with my invention. Fig. 2 is a side elevation thereof. Fig. 3 is an end view of the wrench looking at 35 the end opposite to that shown in Fig. 1. Fig. 4 is a sectional view taken through the socket member of the wrench, the handle being shown in dotted lines. Fig. 5 is an elevational view partly in section illustrating 40 my invention as embodied in a bolt. Fig. 6 is an elevational view partly in section showing my invention applied to a nut.

Referring to the drawings, wherein like numerals represent like parts in the several 45 views, 10 designates a rotatable member which in Figs. 1 to 4 is illustrated as being the nut-receiving or socket member of a wrench. The socket member 10 has a socket opening 11 through the body portion thereof 50 which, as shown in Fig. 4 is square in cross-section, so as to receive a square-headed bolt nut, or the like, but, of course, the socket opening 11 may be a polygon of any number of sides, such as, for instance, six or eight. At 55 one end of the socket or rotatable member 10

is a handle-receiving socket or seat 12 which is preferably formed of a plurality of projections 13 provided with internal shoulders 14 projecting inwardly toward the axial center of the socket member and beyond the line of the walls of the socket opening 11. The bearing surfaces of the shoulders 14 are preferably curved to make the socket or seat 12 of spherical shape.

15 15 designates notches or grooves in the end of the socket member and between the projections 13 and in the present illustration of my invention four such notches are shown which, of course, corresponds to the number of projections, but it is to be understood that 20 the number of notches and projections may be varied as desired.

The member which cooperates with the socket member 10 comprises a handle portion 16 having a spherical ball 17 at its end, 25 which ball is adapted to seat in the spherical seat or socket 12, so as to provide a ball-and-socket arrangement. With the construction shown in Figs. 1 to 4 the handle 16 and the socket member 10 are assembled by inserting the outer end of the handle, in the 30 open end of the socket opening 11 and drawing the socket member downwardly over the handle until the ball engages in the spherical socket 12, it being understood that the socket opening 11 is just large enough to receive the ball 17. If desired, a pin 18, or 35 other means may be provided to retain the ball in its spherical seat, and in the present instance the pin is shown as extending diametrically through the walls of the socket member and across the socket opening 40 thereof.

The operation of my device is evident 45 from the above description, it being understood that when it is desired to turn a nut or bolt the head of the same is received by the socket opening 11 of the socket member and the handle is drawn or moved into position at right angles to the axial line of the 50 socket member, so that the handle engages in one of the notches 15 and between the projections as shown in full lines, Fig. 2. The handle is then given a partial turn until an obstruction or the like prevents further ro- 55 tary movement when the handle is withdrawn from the notch in which it is engaged by moving the same into axial alignment with the socket member, which position is shown by dotted lines, Fig. 2, it being then

moved into the next succeeding notch or groove and given another partial turn, and so on, until the nut is turned into place.

Of course, if no abstraction is present the socket member may be moved continuously.

In Fig. 5, which discloses another application of my improvement, I have illustrated the rotatable member as having a bolt portion or screw-threaded shank 10'. In-10 tegnal with the bolt 10' is a handle-receiving socket member having a spherical seat 12' formed by projections 13' which are turned inwardly toward each other and over the ball, after the ball 17 of the handle is placed therebetween, so as to prevent withdrawal of the ball from the spherical seat 12.

In Fig. 6 is a structure similar to that disclosed in Fig. 5, except that in place of a bolt the rotatable member consists of a nut 10'' having a screw-threaded socket 19 to receive the end of a bolt, or the like.

It is, of course, to be understood that my device is applicable to other uses than those disclosed and the rotatable member may be 25 changed as desired depending on the use to which my device may be put.

My device is susceptible of various modifications and changes which would be within the spirit of my invention without departing 30 from the scope of the following claims.

What I claim is—

1. In combination, an operating member and a rotatable member, one of said mem-35 bers having an enlarged portion, and the other of said members having a socket receiving said enlarged portion, one of said members also having a plurality of notches any one of which is adapted to receive the 40 other member when the members are in position for turning the rotatable member.

2. In combination, an operating member and a rotatable member, one of said mem-45 bers having an enlarged portion, and the other of said members having a socket receiving said enlarged portion, the member having said socket also having a plurality of 50 notches any one of which is adapted to receive the other member when the members are in position for turning the rotatable member.

3. In combination, an operating member and a rotatable member, one of said mem-55 bers having an enlarged portion, and the other of said members having a socket for receiving said enlarged portion, said member having said socket also having projec-60 tions thereabout against any one of which said member having said enlarged portion is adapted to engage to permit turning of the 65 rotatable member.

4. In combination, a handle having an enlarged end, and a rotatable member hav- ing a socket receiving said enlarged end, said rotatable member also having a plu-70 rality of notches in any one of which said

handle is adapted to engage to permit turn- ing of said rotatable member.

5. In combination, a handle having an en-75 larged end, and a rotatable member having a socket for receiving said enlarged end, and projections about said socket against any one of which the handle is adapted to 80 engage to permit turning of said rotatable member.

6. In combination, a handle having a 75 spherical ball at one end thereof, and a rotatable member having a spherical socket to receive said ball, said rotatable member having notches in the wall of said socket any one of which is adapted to receive said 80 handle to permit turning of the rotatable member.

7. In combination, a handle having a 85 ball at one end thereof, a rotatable member having a socket opening to receive a nut or the like, a spherical socket on said rotatable member for said ball, and grooves or notches in the walls of said socket to receive said handle to permit turning of the 90 rotatable member.

8. In combination, a handle having a ball, a rotatable member having a through open-95 ing large enough to allow said ball to pass therethrough, a socket at the end of said opening for the reception of the ball and notches in said socket adapted to receive the handle to permit turning of the rota-100 table member.

9. In a wrench, a handle having an en-105 larged end, a socket member having a socket opening to receive a nut or the like, and through which the ball is adapted to pass, a spherical seat at one end of said socket member adapted to receive said ball and having notches in its walls for the re-110 ception of the handle to permit turning of the rotatable member.

10. In a wrench, a handle having a spheri-115 cal ball at one end, a socket member having a socket opening to receive a nut or the like and through which the ball is adapted to pass, a spherical seat at one end of said socket member adapted to receive said ball 120 and having notches in its walls for the reception of the handle to permit turning of the rotatable member.

11. In combination, a handle having a 125 ball at one end thereof, a rotatable member having a through socket opening to receive a nut or the like and through which the ball is adapted to pass, a spherical socket on said rotatable member for said ball and 130 having grooves or notches in its walls to receive said handle to permit turning of the rotatable member, and means to prevent displacement of said ball from its spherical 135 socket.

12. In combination, a handle having a 140 ball at one end thereof, a socket member having a socket opening to receive a nut or the like and through which the ball is adapted to pass, a spherical seat for said 145

hall having notches in its walls for the reception of the handle to permit turning of the rotatable member, and a pin passing through said socket opening to prevent displacement of the ball from its spherical seat.

In testimony whereof I have hereunto set

my hand in presence of two subscribing witnesses.

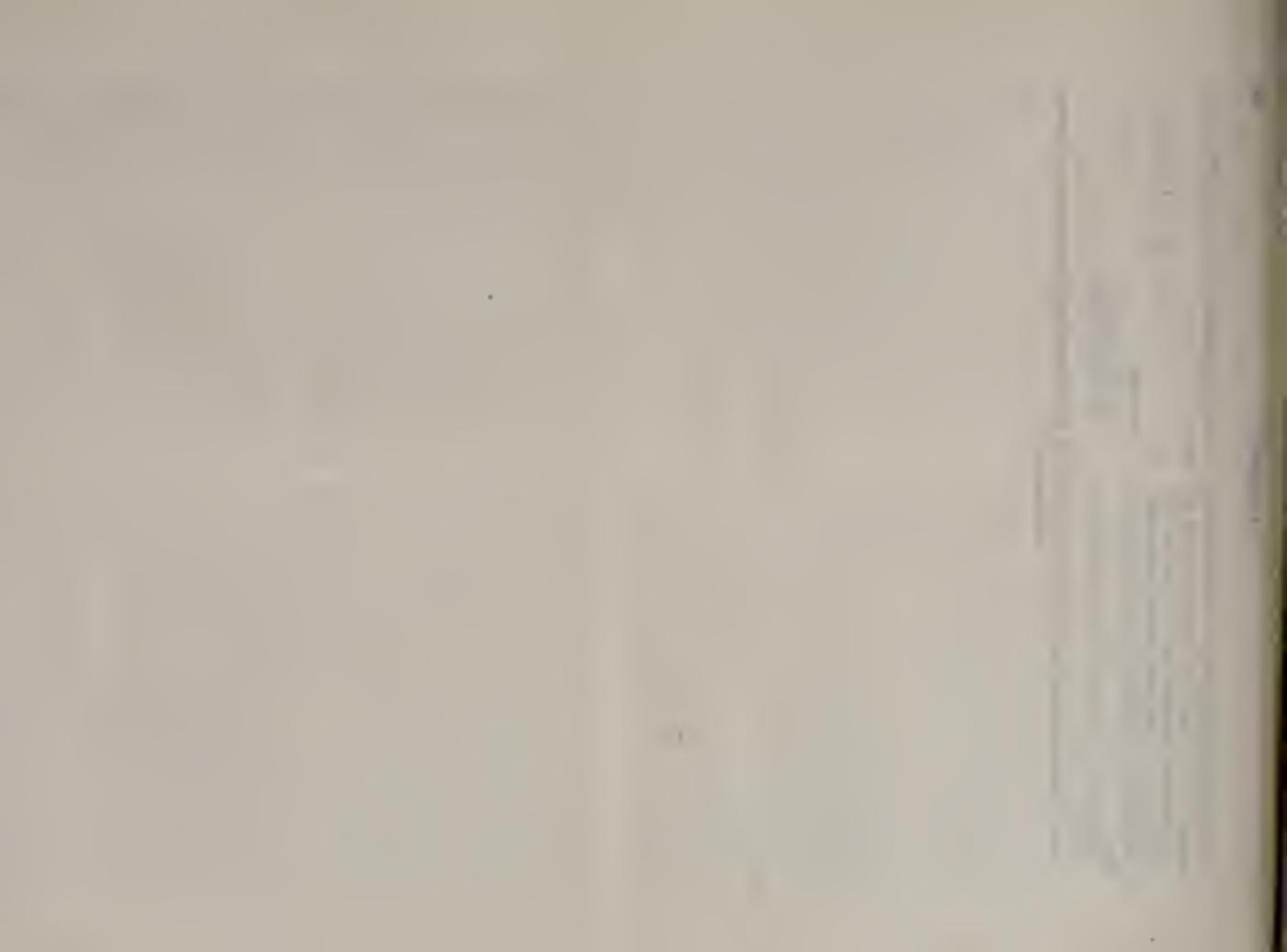
OREN F. BALTZLEY.

Witnesses:

C. E. ALBERT,

D. ELMER WOLF.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."



M. J. FAIRCHILD

Socket Wrench

No. 1,292,285

January 21, 1919

DEFENDANT'S EXHIBIT "J"

Filed July 11, 1932.

G. H. Marsh, Clerk.

Fig 1



Fig 2

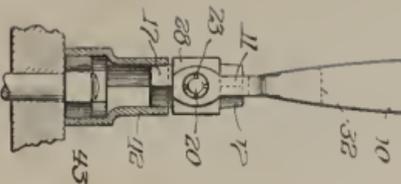
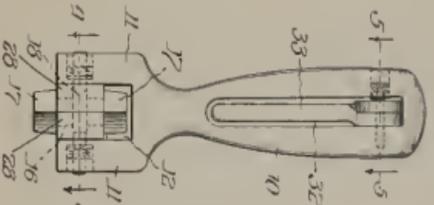


Fig 3

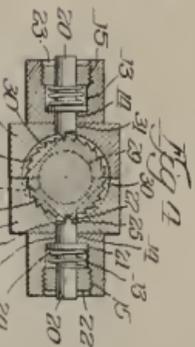


Fig 4

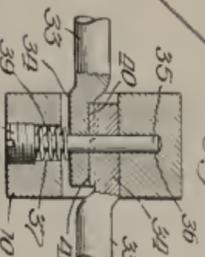
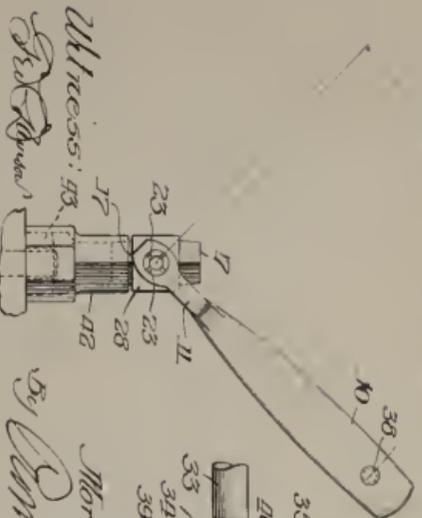


Fig 5



Witness:
By *Ernest A. ...*
Ernest A. ...
Attys.

Tracy Yorlori
Mortimer J. Kunchfeld

UNITED STATES PATENT OFFICE.

MORTIMER J. FAIRCHILD, OF ELGIN, ILLINOIS.

SOCKET-WRENCH.

1,292,285.

Specification of Letters Patent.

Patented Jan. 21, 1919.

Application filed June 18, 1918. Serial No. 240,749.

To all whom it may concern:

Be it known that I, MORTIMER J. FAIRCHILD, a citizen of the United States, residing at Elgin, in the county of Kane and State of Illinois, have invented certain new and useful Improvements in Socket-Wrenches, of which the following is a specification.

This invention relates to improvements in 10 wrenches of the type commonly designated as socket wrenches or those wherein is embodied an actuating head designed for cooperation with a socket member properly shaped for application to the work.

It is the main and primary object of the present invention to improve the general construction of socket wrenches whereby to render them capable of greater range of use in restricted localities, and to simplify the same as far as possible in order to reduce wear in the working parts to a minimum and thereby prolong the life of the wrench.

A further object of the invention is the provision of a wrench of the class described the parts of which are so organized and related as to be easily and quickly assembled, as well as taken apart when necessary, for inspection or repair may arise, and which will provide a highly compact structure economical in space in packing and shipment.

Other objects and advantages will appear as the nature of the improvements is better understood, the invention consisting substantially in the novel construction, combination and arrangement of parts hereinafter fully described, illustrated in the accompanying drawings, and finally pointed out in the appended claims. It is to be understood, however, that the present explanation of the invention is but one embodiment thereof, and the same, therefore, is to be taken only in an illustrative, and not in a restrictive, sense.

In the drawings—

Figure 1 is a side elevation of a socket wrench constructed in accordance with the present invention and illustrated as applied to a socket, as under certain conditions of use;

Figure 2 is a similar view taken at right angles to Fig. 1;

Fig. 3 is also a side elevation of the heredescribed wrench illustrating another

condition under which the same may be used;

Fig. 4 is a sectional view, as on the line 4-4, Fig. 2;

Fig. 5 is also a sectional view, as on the line 5-5, Fig. 2.

Referring now in detail to the accompanying drawings, the numeral 10 designates the shank of the heredescribed wrench. This is shaped for convenient application of the fore, tapers slightly from one end toward the other. At the latter point the end of the shank 10 is enlarged to provide a pair of parallel supporting arms 11, said arms being arranged in order to form a notch 12 therebetween. The arms 11 are provided with outwardly-opening chambers 13 the inner ends of which communicate with contracted passages 14 while the outer ends of said chambers 13 are screw-threaded, as at 15, for a purpose to be presently described.

Arranged within the notch 12 is an engaging head which includes an elongated shank 16, which is cylindrical in cross-section, the ends of said shank 16 terminating in enlarged polygonal actuating plugs 17. These plugs are reversely tapered with respect to each other and are designed to be inserted into the socket with which the wrench is employed. By reason of the reverse tapering of the plugs 17 they may be alternatively used, in accordance with the direction of rotation to be imparted to the socket, as will later appear. At a point midway between the plugs 17 the shank 16 is enlarged to form an annular flange 18, and said flange is provided with a series of ratchet teeth 19 adapted to be engaged by the inner ends of oppositely-disposed reversely-arranged pawls 20. The pawls 20 are slidably mounted in the passages 14 and each is provided with an annular flange 21 of substantially the same diameter as the chambers 13. The pawls 20 are of sufficient length to extend through said chambers 13, and their outer extremities are received by perforated closure plugs 22 having screw-threaded engagement with the threads 15 of the chambers 13. Each of the plugs 22 is provided, at its outer face, with grooves or

kerfs 23 for the reception of a suitable instrument, such as a screw driver, for rotating the plugs when introducing the same to and

removing them from the chambers 13. Encircling each of the pawls 20, and interposed between the flange 21 thereof and the screw plug 22 through which its outer end passes, is a coiled spring 24. The tension of these springs obviously is regulated by the adjustment of the screw plugs 22, and said springs serve to force the pawls 20 inwardly and to maintain the inner ends thereof in engagement with the ratchet teeth 19 of the flange 18. To effect such engagement between the pawls 20 and said teeth 19 each of the pawls has, at its inner end, a tooth 25 provided with an abrupt face 26 and an inclined face 27. The abrupt face 26 effects a locking engagement between each pawl and the teeth 19, thus causing the flange 18 to move with the pawls 20, while the inclined faces 27 of said pawls will permit the latter to ride over the teeth 19 to free the same from the locking engagement referred to.

Surrounding the engaging head is a pair of supporting blocks 28. The opposing faces of said supporting blocks 28 are provided with semi-circular notches 29 to permit the blocks 28 snugly fitting about and surrounding the cylindrical shank 16, and each of said blocks 28 is also provided with an interior semi-circular groove 30 for receiving the ratcheted flange 18 when the blocks are assembled upon the engaging head. It will also be observed that the blocks 28 are likewise provided with openings 31 arranged in alignment with the passages 14, said openings 31 receiving the inner ends of the pawls 30 and thus permitting the latter to engage the teeth 19. By reason of this construction it will be seen that the pawls 20 not only engage the ratcheted flange 18, but by reason of the inner ends of the pawls passing through the openings 31 the pawls form pivots or runways on which the supporting blocks 28 may be rotated. This permits the engaging head to be reversed, and each of the actuating plugs 17 which thus be presented to the socket with which the wrench is employed. This also provides for reversing the direction of movement of the ratcheted flange 18 it being apparent that when one of the plugs 17 is engaged with the socket the pawls will rotate the ratcheted flange in one direction, while by rotating the head to present the other plug 17 for engagement with the socket the direction of the ratchet teeth 19 will be reversed.

Extending longitudinally of the shank 10 is an elongated slot 32 in which is fitted a pair of handle bars 33. The adjacent ends of these bars 33 are enlarged and form offset heads 34, said heads being perforated for receiving a pivot pin 35 the inner end of which is seated in a drilled socket 36 formed at one side of the slot 32. The opposite end of the pin 35 extends into an opening 37 which is of greater diameter than the socket

36, said opening 37 being formed through the shank 10 at the other side of the slot 32. A screw-threaded locking plug 38 is fitted in the opening 37, and interposed between said plug 38 and the next adjacent handle bar 33 is a coiled spring 39 which presses the head 34 of said bar 33 toward the head of the other bar 33. These heads are adapted to be interlocked with each other, and to this end one of the same is provided with radial ribs 40 adapted to fit within radial grooves 41 formed in the contiguous face of the other head. The spring 39 exerts its pressure to maintain the ribs 40 seated in said grooves. The folded position of the handle bars 33 is illustrated in Fig. 2 wherein they appear as within the slot 32; when it is desired to use the same they are moved to the position illustrated in Fig. 1, it being obvious that the spring 39 will permit relative movement of the bars with respect to each other, and thereby permit the same either to be opened or closed.

The herein described wrench is designed for use with an assortment of sockets one of which is illustrated in Fig. 1 and designated by the numeral 42. The latter is illustrated as applied to a nut 43. When using the wrench one of the actuating plugs 17 is introduced into the socket 42, and by rotating the shank 10, the pawls 20 being normally urged by the springs 24 into engagement with the ratcheted flange 18, the plug and socket will be rotated. This, of course, assumes that the direction of rotation is such that the abrupt faces 26 of the pawls 20 contact the teeth 19. On the reverse rotation, however, of the shank the pawls 20 will ride over the teeth 19 and the socket 42 will remain stationary. If it be desired to reverse the direction of rotation of the socket, 42 the wrench is removed therefrom; the engaging head is rotated 180° in order to present the other actuating plug 17 to the socket 42, and with the wrench now engaged with the socket 42, and with the shank 10 now rotated in a reverse direction, the socket 42 will be rotated in the reverse direction.

By the construction described the shank 10 may stand in relation to the engaging head as in Fig. 1, in which position it is in alignment therewith, or it may be swung at right angles thereto, or it may be moved at any position intermediate of the two described, as illustrated in Fig. 3. In the position illustrated in Fig. 1 rotation of the shank 10 will be more conveniently effected by swinging the handle bars 33 outwardly from the slot 32 and into the position illustrated in Fig. 1. In doing this slight pressure is exerted on the handle bars 33 to separate the heads 34 thereof, and when they are moved to the desired position the spring 39 will reassert itself, forcing the ribs 40 of the one member into the grooves 41

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41 of the other, and thus maintain the handle bars at the desired angle in relation to each other.

I claim:

- 5 1. A wrench of the class described, comprising a shank, a ratcheted engaging head pivotally mounted therein, and a plurality of pawls carried by said shank for engaging with the ratcheted head, said pawls forming trunnions on which said engaging head rotates to position the head for engagement with a socket under reverse directions of movement.
- 10 2. A wrench of the class described, comprising a shank, a ratcheted engaging head pivotally mounted therein and provided with reversely arranged socket-engaging members, and a plurality of pawls carried by said shank for engagement with said ratcheted head, said pawls forming trunnions on which said engaging head rotates to position the head for engagement with a socket under reverse directions of movement.
- 15 3. A wrench of the class described, comprising a shank provided with oppositely arranged parallel arms, a ratcheted engaging head pivotally mounted between said arms, and a plurality of pawls carried by said arms and projecting inwardly therefrom for engagement with said ratcheted head, said pawls forming trunnions on which said engaging head rotates to position the head for engagement with a socket under reverse directions of movement.
- 20 4. A wrench of the class described, comprising a shank provided at one end with a pair of parallel arms, a ratcheted engaging head arranged between said arms and provided with reversely arranged actuating plugs, and a plurality of pawls carried by said arms and projecting inwardly therefrom for engagement with said ratcheted head, said pawls forming trunnions on which said engaging head rotates to position the head for engagement with a socket under reverse directions of movement.
- 25 5. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.
- 30 6. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.
- 35 7. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.
- 40 8. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.
- 45 9. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.
- 50 10. A wrench of the class described, comprising a shank provided at one of its ends with a notch, said shank being also provided at opposite sides of said notch with a plurality of chambers in communication with the notch, a ratcheted engaging head arranged in said notch, a plurality of inwardly extending pawls mounted in said chambers and having their inner ends projected into said notch for engagement with the ratcheted head, springs arranged in said openings for normally forcing said pawls inwardly thereof, and into engagement with said ratcheted head, and means for retaining said springs within said chambers.
- 55 11. A wrench of the class described, comprising a shank provided at one of its ends with a notch, said shank being also provided at opposite sides of said notch with a plurality of chambers in communication with the notch, a ratcheted engaging head arranged in said notch, a plurality of inwardly extending pawls mounted in said chambers and having their inner ends projected into said notch for engagement with the ratcheted head, springs arranged in said chambers and normally forcing the pawls into engagement with said ratcheted head, and a closure plug arranged in each of said chambers for retaining the springs therein.
- 60 12. A wrench of the class described, comprising a shank provided with an elongated

130 mounted in said arms and projecting inwardly therefrom into engagement with said ratcheted head, and means for normally forcing said pawls into said engagement,

140 said pawls forming trunnions on which said engaging head rotates to position the head for engagement with a socket under reverse directions of movement.

150 7. A wrench of the class described, comprising a shank provided at one of its ends with a notch, an engaging head arranged in said notch, a ratchet carried by said head, and a plurality of pawls carried by said shank and projecting into said notch and into engagement with said ratchet, said pawls forming trunnions on which said engaging head rotates to position the head for engagement with the socket under reverse directions of movement.

160 8. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.

170 9. A wrench of the class described, comprising a shank provided at one of its ends with an opening, a ratcheted engaging head arranged in said opening, a pair of supporting blocks surrounding said ratcheted head and serving to maintain the latter within said opening, and a pair of inwardly extending pawls carried by said shank and projecting into said opening, the inner ends of said pawls being extended through said supporting blocks for engagement with said ratcheted head at opposite sides thereof, and means for normally forcing both said pawls inwardly into such engagement.

180 10. A wrench of the class described, comprising a shank provided at one of its ends with a notch, said shank being also provided at opposite sides of said notch with a plurality of chambers in communication with the notch, a ratcheted engaging head arranged in said notch, a plurality of inwardly extending pawls mounted in said chambers and having their inner ends projected into said notch for engagement with the ratcheted head, springs arranged in said openings for normally forcing said pawls inwardly thereof, and into engagement with said ratcheted head, and means for retaining said springs within said chambers.

190 11. A wrench of the class described, comprising a shank provided with an elongated

slot, socket-engaging means associated with said shank, a pin extended across said slot, a pair of handle bars arranged in said slot and pivotally mounted on said pin for relative movement with respect to each other, and means for maintaining said handle bars in relative positions of adjustment.

12. A wrench of the class described, comprising a shank provided with an elongated slot, socket engaging means associated with said shank, a pair of handle bars concentrically pivoted within said slot for relative movement with respect to each other, means for frictionally maintaining said handle bars in relative positions of adjustment, and yielding means for holding said bars against displacement from adjusted position.

13. A wrench of the class described, comprising a shank provided with an elongated slot, socket engaging means associated with said shank, a pin extended across said slot, a pair of handle bars arranged in said slot

and capable of relative movement with respect to each other, the contiguous portions of said handle bars being enlarged to provide heads, said heads being perforated for receiving said pin whereby to pivot said bars thereon, radial ribs carried by one of said bars, the opposing face of the other bar being grooved for the reception of said ribs, said ribs and grooves effecting an interlocking relation between said bars to hold the same in relative positions of their adjustment, and a spring surrounding said pin and exerting its pressure to maintain the engaging portions of said bars against relative movement.

In witness whereof I have hereunto signed my name in the presence of two subscribing witnesses.

MORTIMER J. FAIRCHILD.

Witnesses:

Helen Wenzel,

R. D. Hollenback.

M. MILLER & A. D. BURG

Wrench

No. 1,302,197

April 29, 1919

DEFENDANT'S EXHIBIT "K"

Filed July 11, 1932.

G. H. Marsh, Clerk.

M. MILLER & A. D. BURG,

WRENCH,

APPLICATION FILED MAR. 16, 1918.

1,302,197.

Patented Apr. 29, 1919.

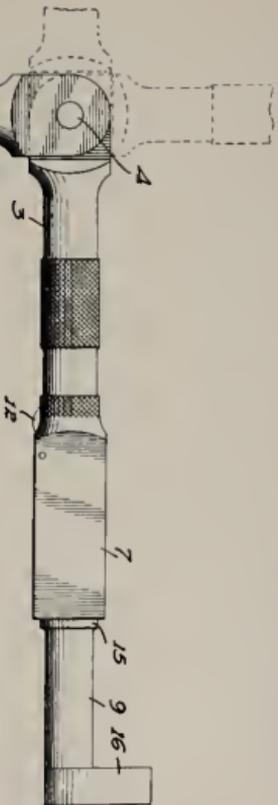


FIG. 1.

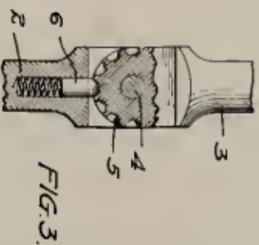


FIG. 3.

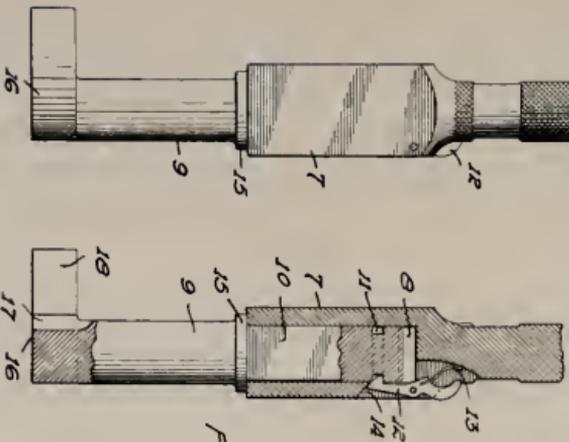


FIG. 2.

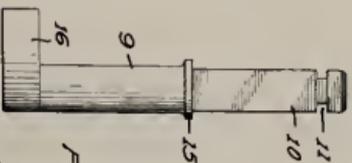


FIG. 5.

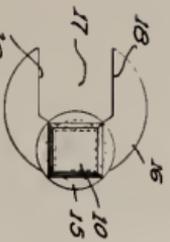


FIG. 4.

WITNESSES
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MELCHOR MILLER
ALFRED D. BURG
BY *Reed & Reed*
ATTORNEYS

UNITED STATES PATENT OFFICE.

MELCHIOR MILLER AND ALFRED D. BURG, OF LE MARS, IOWA; SAID ALFRED D. BURG
ASSIGNOR TO L. J. BURG, OF ST. PAUL, MINNESOTA.

WRENCH.

1,302,197.

Specification of Letters Patent.

Patented Apr. 29, 1919.

Application filed March 16, 1916. Serial No. 64,525.

To all whom it may concern:

Be it known that we, MELCHIOR MILLER and ALFRED D. BURG, citizens of the United States, residents of Le Mars, county of Plymouth, State of Iowa, have invented certain new and useful Improvements in Wrenches, of which the following is a specification.

The object of our invention is to improve the wrench shown and described in a pending application for Letters Patent of the United States, filed by us on the 2nd day of December, 1915, Serial No. 64,725, to the end that any desired number of wrench jaws adapted for nuts or bolts' heads of various shapes and sizes can be used with a single shank, thereby effecting a considerable saving in the cost and weight of a wrench equipment or set.

Other objects of the invention will appear from the following detailed description.

The invention consists generally in various constructions and combinations, all as hereinafter described and particularly pointed out in the claims.

In the accompanying drawings forming part of this specification,

Figure 1 is a view of a wrench embodying our invention,

Fig. 2 is a sectional view through the shank of the wrench, showing the manner of mounting a jaw thereon,

Fig. 3 is a detail sectional view of the joint between the two sections of the wrench,

Fig. 4 is an end view of one of the jaws removed from the wrench shank,

Fig. 5 is a side view of one of the jaw shanks and its head removed from the wrench shank.

In the drawing, 2 and 3 represent the shanks and hand grips of the wrench. The abutting ends of these shanks are pivotally connected to one another by a pivot pin 4 and one of the shanks has ratchet teeth 5 formed therein in position to be engaged by a spring-pressed pin 6 that is mounted in the other shank, thereby forming a ratchet connection between the two shanks for holding them in alignment with one another or in an angular relation, as may be desired. Each shank is provided with an end portion 7 having a longitudinal socket 8 formed therein, said socket being polygonal in cross section. 9 is a jaw shank having an end portion 10 adapted to fit into

the socket 8 and provided with an annular groove 11. A latch 12 is mounted to enter said groove and is normally held therein by means of a spring 13 fitting within a recess 14 in the shank of the hand grip. The shank 9 preferably has a shoulder 15 formed thereon which contacts with the end 7 for limiting the insertion of the shank 9 into the socket 8 and insuring the proper register of the groove 11 with the locking latch. 65

At the outer end of the shank 9 we mount a jaw head, preferably in the form shown, consisting of a disk-like member 16 arranged in a plane at right angles substantially to the longitudinal axis of the shank 7 and mounted eccentrically with respect thereto. A recess 17 is provided in the head, extending inwardly, preferably to a point near the shank. This recess has opposing faces 18 in planes parallel with the longitudinal axis of the shank and adapted to bear on the nut or bolt-head that is inserted into the recess. This jaw head, may be made in various sizes and its shape may be modified, if preferred, and it is preferably rigidly mounted or secured on the jaw shank, the recess 17 therein being adapted for different sizes and shapes of nuts or bolt heads.

The sockets 8 are of different sizes, and the shanks 9 fitting therein also vary in cross sectional area and have heads of different sizes thereon, so that with a single shank or handle the tool may be adapted for use as a large or a small wrench. Generally it is necessary to provide wrench shafts of different length and jaws of different strength and weight to adapt the wrench for use on large or small nuts or bolts, while our invention contemplates the combination of a large and a small wrench in one and a variety of jaws for both the large and the small wrench, to adapt the tool for all requirements of a tool of this kind. 100

We have designated the two sizes of shanks by the same reference numeral, as they are preferably formed in substantially the same way, the difference consisting generally in using a smaller gage of jaw shank and jaw head therefor at one end of the wrench than at the other.

By providing an annular groove 11 in the end 10 we are able to insert the shank 9 therein with the head projecting in either 110

direction, according to the convenience of the user of the tool, and as these shanks all correspond substantially in size, we may provide a series of the shanks 9 and the heads thereon with different sizes of sockets 17, so that the user of the wrench can have a sufficient number of jaws of different sizes to fit all the different sizes of nuts and bolts on which he may wish to use the tool.

10 It often happens that the user of this tool wishes to rotate it when the shank members are in line with each other and when one shank and the head thereon can be used as a hand grip for operating the other shank, 15 as, for instance, when it is found necessary to operate the tool through the spokes of a wheel or in some position on the car where there is no room to move the tool with one shank member at an angle to the other.

20 Each wrench, when sold, will comprise the hand grip shanks, pivotally connected to one another, and a series of jaw shanks having claw shaped heads thereon adapted for engaging nuts and bolts of various 25 shapes and sizes.

In various ways the details of construction herein shown and described may be modified and still be within the scope of our invention.

We claim as our invention:

A wrench comprising hand grip shanks having abutting ends hinged together, the opposite ends of said shanks having longitudinal sockets formed therein, jaw shanks fitting within said sockets and having means for holding them against rotary movement and having heads formed thereon and provided with jaws and gripping faces in planes parallel substantially with the axes of said jaw shanks and eccentric with respect thereto, the jaws of said shanks being of varying size to adapt the wrench for nut and bolt heads of different sizes, each hand grip shank being mounted for angular adjustment with respect to the other shank, or for alignment with each other, and either jaw shank and head thereon forming a hand grip for rotating the tool and the other jaw shank when said hand grip shanks are in line with each other.

In witness whereof, we have hereunto set our hands this 9th day of March 1916.

MEICHTOR MILLER.

ALFRED D. BURG.

Witnesses:

J. T. KEENAN,
K. STROUSE.

(Testimony of M. B. Pendleton.)

Patent to Miottel, dated February 1, 1916, No. 1169987, marked Defendant's Exhibit "G";

Patent to Miller & Berg, No. 1175973, dated March 21, 1916, marked Defendant's Exhibit "H";

Patent to Baltzley No. 1209658, dated December 26, 1916, marked Defendant's Exhibit "I";

Patent to Fairchild, No. 1292285, dated January 21, 1919, marked Defendant's Exhibit "J";

Patent to Miller & Berg No. 1302197, dated April 20, 1919, marked Defendant's Exhibit "K";

Defendant then offered, and there was received in evidence, the file wrapper showing the proceedings in the U. S. Patent Office relating to the Eagle Patent. The file wrapper was marked Defendant's Exhibit "L". Defendant's counsel having supplied the court for the court's convenience copies of the patents introduced, chronologically arranged, and a copy of the file wrapper pointed out to the court that only the patents to Mandeville (Defendant's Exhibit "C"), to Helstrom (Defendant's Exhibit F), to Miottel (Defendant's Exhibit "C") and the patent to Baltzley (Defendant's Exhibit "I") were found by the patent office.

W. E. KELLY

was called as a witness on behalf of the Defendant and testified that he lives at Milwaukie, Oregon, that he was an architect, that his experience with mechanics consisted of a course in engineering which he took when he was quite young, that he had made a great many patent drawings and had taken out a few

(Testimony of W. E. Kelly.)

patents of [61] his own; that he had examined the Edmands Patent (Defendant's Exhibit "D"). Defendant's Exhibit "AA", a model of the Edmands wrench and "BB", a wrench manufactured by the defendant were offered and received in evidence. The model of the Edmands' wrench (Exhibit "AA") was admitted after it was explained that a portion of the handle of the model had been cut away for the purpose of showing the operation of the wrench and to the extent of the portion cut away the model was not a true representation of the Edmands' wrench.

The witness pointed out on the model of the Edmands' wrench the points identified in the Edmands' patent; that (a) represented the handle or the stem of the wrench, (a) having a bifurcated head.

"Mr. RAMSEY: May I interrupt. One exception to that model that my attention has been called to, that does not have a cross handle (c) as the Edmands does.

A. That is just a part that would come through.

Mr. GEISLER: We have that right here, and just omitted as a matter of convenience; has no bearing on it; makes a 'T' of it; you can put that in if you like.

COURT: Admit it all as part of the exhibit.

Mr. RAMSEY: The patent doesn't call that removeable. With that exception, that the patent does not note that is a removeable pin; as far as the patent shows, it is fixed.

COURT: Proceed.

A. You were asking about (a) which is the handle, and which has a bifurcated head through which the pin is placed that supports the socket, the socket support pivoted about

(Testimony of W. E. Kelly.)

the pin, but the socket support is notched, enabling one to remove the socket by means of removal of the support.

Q. The socket is removable, as I understand?

A. The socket is removable; just another means of removing; it slips over the pin rather than over the socket support; it has one less part than the one we have been talking about.

Q. Which is that? One less part than what?

A. The socket support is all one piece.

Q. And you are referring to what when you say the one we have been talking about? What patent do you mean talking about? The Eagle patent?

A. The Eagle patent; one less part."

The witness was then asked to compare the Edmands patent with the Eagle patent and to point out the same features common to both patents. He said:

"A. The fact that this is pivoted about a pin is similar; the only difference is the means of removing the socket.

Q. To make the socket support there, which is pivoted in the shank handle, removable instead of a fixed piece, state whether you would consider that a mere mechanical expediency, or not? [62]

A. It would just be a mechanical difference; there is very little advantage one way or the other whether it is a fixed pin or removable as this is; as far as its action in actual work is concerned, this will do anything the other will do.

Q. And that removable socket there and the lug in which it is attached to the bifurcated end of the handle is in one piece? A. Yes.

Q. Would there be any mechanical advantage in making

(Testimony of W. E. Kelly.)

these two parts, which are now in one, in two parts; I mean in making the lug and the socket in two separate pieces instead of in one piece? Would there be any mechanical advantage in that?

A. I don't see any advantage at all; this does anything the other will do.

Q. Now to substitute for that female socket there, or have a socket, a male connector, which itself is to receive one of the series of sockets, would you consider that as any great advantage over that, or any advance over the construction by Edmands?

A. Making an adapter to put in place of this solid, that would make it possible to use any standard set of sockets.

Q. Would you consider that anything more than a mere mechanical expedient?

A. It would have an advantage inasmuch as this part could be very easily changed in case wear would take place.

Q. Which would have an advantage, the structure you have in your hand?

A. The one I have in my hand would have an advantage because it is open and can be easily removed; the other might wear, of course.

Q. So in the Edmands construction you find an advantage in that the socket itself may be removed and substituted by another socket which is not so much worn in service? A. It is more easily changed.

Q. State whether or not it is a common expedient and an advantage to have a tool chest comprising a single wrench tool or a series of sockets in different sizes?

(Testimony of W. E. Kelly.)

A. Yes, it is a common practice.

Q. Now if you had that Edmands tool, and in connection with that a series of replaceable sockets adapted to different work, state whether or not you would consider that as an expedient tool chest.

A. Yes, the Edmands—this design of wrench would be quite a complete set yes, if you had a full number of sockets to go in it.

Q. Now comparing the Eagle wrench with the Edmands wrench, state whether you find in the Eagle wrench any advantage in construction or use over the Edmands wrench; in the Eagle over the Edmands, the question is.

A. Not with the possible addition of this adapter, I don't see any advantage; I believe it is fully as good as the Eagle.

Q. State whether or not an adapter is a well known mechanical piece.

A. Yes, every mechanic knows what an adapter would be.

Q. Now there is 'one difference in the Eagle wrench with respect to the Edmands in that the Eagle shows a male connector on which the socket is to be placed instead of having the socket as the connecting piece in one, as in the Edmands. I call your attention to the patent of Fairchild, 'J'. I hand you herewith a model and ask you to compare that with the Fairchild patent,—'M'. Please compare that model with the Fairchild patent, No. 1,292,285, and state, after your comparison whether that model represents the Fairchild patent; just explained. [63]

(Testimony of W. E. Kelly.)

A. Outside of the style of the handle it is an exact duplication.

Q. And it however omits the ratchet part?

A. The ratchet part, that is omitted, that part of the handle.

Q. But it does include that part (17) in Fig. 2, for instance, or in all the figures of the Fairchild patent drawing.

A. This squared shank.

Q. The squared shank, yes.

A. It has two, instead of one.

Q. With squared shank. Do you find that squared shank as suggestive of a part in the Eagle construction?

A. Yes, sir.

Q. State whether or not that is the equivalent of the Part (4) of the Eagle patent drawing?

A. In principle it is the same.

Q. It is intended to receive a socket like (42) in the Fairchild drawing? A. Yes, it does.

Q. With the Fairchild patent before you, and with the Edmands patent before you, state whether or not you would consider it difficult for a mechanic to provide means in a wrench for holding the movable socket support in different positions, I mean a spring friction pin, or its equivalent?

A. There is no provision made to hold the Fairchild, where there is in the Edmands. The support in the Edmands is very similar to the——

Q. Now if I asked you to design a wrench which had socket holding piece, and to provide means for holding that in different positions, angular positions, with the knowledge

(Testimony of W. E. Kelly.)

of these two patents before you, would you find any difficulty in making such a wrench? A. No.”

The defendant introduced Defendant’s Exhibit “M”, a model of the Fairchild wrench, which was admitted into evidence by the court to illustrate the witness’ testimony concerning the parts of this wrench which compared with the Eagle wrench, it being explained that the model was not an exact duplication of the Fairchild wrench, the ratchet mechanism having been omitted and a portion of the wrench having been cut away in order to expose its operation.

There was offered by the defendant and received in evidence Exhibit “AA” showing how the Edmands wrench is made and Exhibit “BB” representing two wrenches which were manufactured by the defendant.

The witness was then asked to identify a piece which the witness identified as an adapter for the Fairchild patent. He was asked to look at said piece and to compare it with the Edmands patent and to state whether or not said piece could be substituted in place of the socket and stated that said piece would be an adapter for any standard socket and used on the Edmands patent. Said piece was then offered in evidence and marked Defendant’s Exhibit “N” for identification. [64]

“Mr. RAMSEY: What is the purpose of this?

A. That is an adapter for Edmands.

Mr. RAMSEY: Why is it introduced as an exhibit, what is it supposed to show?

Mr. GEISLER: Just the part being removable; that socket being removable from the Edmands wrench, this adapter may be put in place of it, in order to put a socket

(Testimony of W. E. Kelly.)

on this. I also have a socket here of some kind, I think will probably fit it. I will put the socket on that, and that explains how it could be used.

Mr. RAMSEY: Is this a piece which the witness has designed, or is this a piece which is supposed to illustrate the prior art? What is the purpose of introducing this piece?

Mr. GEISLER: Yes, it illustrates in a way the prior art, it shows what can be done; mechanical expediency.

Mr. RAMSEY: I object to the introduction; has no basis in the prior art; I will not object as a piece which this witness might have invented to be used with the Edmands wrench, but unless a basis is laid for this as being old in the prior art, I object strenuously to the introduction of it as an exhibit.

COURT: As I take it, there is no claim at the present time that it was used with that. This is simply to be used, possible mechanical adaptation, in accordance with the witness's testimony, simply a mechanical expedient. Of course the weight of that testimony is a different proposition.

Mr. RAMSEY: I asked council if it was an example of the prior art; he said something of prior art; if an example of prior art, I object, but if it is a device which he has devised for use with the Edmands wrench, and something of his own invention, then we don't object to it.

COURT: I don't think any basis so far, except adaptation of possible uses in the prior art.

Mr. GEISLER: That is all I am claiming for it.

COURT: On that basis, it is admitted. (as Defendant's Exhibit M)

(Testimony of W. E. Kelly.)

On Cross-examination

the witness Kelly testified that he was a practicing architect; that he was a graduate steam engineer having completed a one-year steam engineering course at Brooking College, South Dakota; that his experience in the automotive tool industry consisted of making catalog drawings, illustrations and patent drawings for special tools. He testified that he was not an employee of defendant P & C. Tool Company and that his experience with tools was gained in connection with work for the defendant company. He testified that he had had no practical use of a wrench of the character of the Eagle wrench except on his own car; that he had never worked at the trade of an automotive mechanic. Asked to explain what he meant on his direct examination as constituting a standard set of sockets, the witness testified that he referred to the type that is ordinarily used; that most manufacturers have a standard type of socket; that a standard set of sockets comprise removable pieces with a [65] full set of sizes adapted to fit standard nuts; that a socket has a non-circular aperture with a base on which is a female socket to fit a standard handle; that it consisted of a metal shell with a bore extending through it. The witness testified that when he compared the Eagle wrench and the use of the Edmands wrench his opinion was based entirely upon theory and not upon the practical use of the wrench. He further testified as follows: [66]

“Q. You say that every mechanic has a set of standard sockets in his kit.

A. I believe yes, the average automobile mechanic has a standard set of sockets.

Q. Now if you provide no adapter with the Edmands patent, can you use the Edmands patent as is shown, with a standard set of sockets? I think the adapter—you spoke of

(Testimony of W. E. Kelly.)

an adapter as something which every mechanic—with which every mechanic is familiar, or is usually familiar.

A. The word adapter would be very familiar to any mechanic, yes.

Q. Which adapter, as you speak of it, which is the double male element, as one form of adapter, is a term with which a mechanic is familiar?

A. That wouldn't be a double male element, it would be hook and male socket.

Q. Your last answer, then, would refer to Defendant's Exhibit 'N'?

A. Yes.

Q. Do you claim that Defendant's Exhibit 'N' is a standard unit with which the average mechanic would be familiar, or is that a special tool which has been specifically devised for use with the Edmands wrench?

A. I couldn't say whether it was standard or not.

Q. Have you ever seen one besides that individual one marked Defendant's Exhibit 'N', in your experience?

A. No, I haven't.

Q. Now referring to the Edmands drawings, which are Defendant's Exhibit AA, will you refer to the drawings please, and have you a wrench before you also?

A. No.

Q. Here it is, Exhibit 'AA'. Is it a common practice for a tool to have a handle?

A. Every tool has a handle.

Q. Is it common to have a pivot pin in a tool?

A. Yes.

Q. Is it common to have a nut engaging socket head in the wrench?

A. Yes.

Q. Then all of the parts noted in the Edmands are old

(Testimony of W. E. Kelly.)

devices of themselves, except for their specific form?

A. Yes, they are old.

Q. In answer to counsel's question with regard to the value, from the use standpoint, you said that the Edmands could do anything that the Eagle could do. When I speak of Edmands I refer to the device shown in the patent drawing of the Edmands patent; and when I speak of the Eagle I speak of a device shown in the patent drawings of the Eagle patent. That was your answer?

A. Yes.

Q. Will it accommodate a standard socket without the addition of some other device?

A. Not without the adapter."

The witness testified that he had been told that a wrench with a hinge handle wore at its pivot point, although he had never worn out any wrench himself. He stated that any wrench, including the Eagle wrench, if used continuously on automobile work for eight to ten hours a day would likely wear out in a week's time, although if it was not used continuously but intermittently it might last [67] for ten years. He said:

"A. I say I have seen assembly lines where men were working rapidly and every minute with their wrench, where it would be possible for the wrench wasn't too hard, possible that any wrench would wear out in a week's time. I don't know that is possible, no. It is all a guess; but comparatively speaking the time or ages a wrench will last is impossible to guess.

Q. Then it is merely an estimate or guess?

A. Absolutely.

Q. You know of no actual experience?

A. No."

(Testimony of W. E. Kelly.)

The witness stated that he had never seen the Edmands wrench or the Fairchild wrench in use in any place. He further testified:

“Q. There is just one other question in regard to that Edmands wrench. Would you arrange the head at right angles to the handle, exactly at right angles, is that it?

A. Yes, that is right angle.

Q. In that position that head is not removable?

A. In the other position it is.

Q. But in the other position it is removable?

A. Yes.

Q. Is the wrench used—is a flex wrench of which the Eagle patent is the original—is the flex wrench used in both positions, with the handle at right angles at one side of the pivot, and also in use with the handle at the opposite side?

A. Is that what you mean? (Illustrating)

Q. Yes. Do they use this flex handle at full normal or right angle position on each side of the pivot?

A. Yes.”

On Re-direct examination

witness Kelly testified:

“Q. State whether or not you would consider it a difficult mechanical expedient to have closed that slot so it couldn't come off, the slot of the Edmands? The socket holder, or socket?

A. Well there is no means of closing it now; of course you could disturb the lock and keep it on.

Q. Would that be a difficult thing to do?

A. No.”

(Testimony of W. E. Kelly.)

On Re-cross examination

the witness referring to his testimony that it would not be a difficult mechanical expedient to close the slot of the Edmands wrench so that the socket holder would not become detached, testified:

“Q. If you did that wouldn't it make that head a solid part and a non-removable part handle?

A. Yes.

Q. And it would destroy its utility as a handle with a movable head, wouldn't it?

A. Yes.” [68]

R. N. SHINN

was called as a witness on behalf of the defendant and on

Direct examination

testified that he resided in Portland, Oregon, was a machinist by trade and had been following that trade for approximately 28 years; that his training consisted of an apprenticeship of six years and taking various little courses with mechanical engineers at an apprenticeship training school; that he was able to read patent drawings. He further testified:

“Q. I will ask you to look at the Edmands patent, Defendant's Exhibit D, and I would ask you to look at Defendant's Exhibit AA, as a model of the Edmands wrench; did you hear the testimony of Mr. Kelly while on the stand?

A. Yes.

Q. State whether or not that interpretation of the Edmands patent drawing with respect to that exhibit you consider to be correct?

(Testimony of R. N. Shinn.)

A. Yes, it is; same as I have used with the Edmands patent myself, and looks very much like it.

Q. What advantage, looking at the Eagle patent, which is Plaintiff's exhibit 2—compare the Eagle patent with the Edmands patent, and state whether you find any advantage in the Eagle patent over the Edmands patent, so far as you—

A. No, I wouldn't say there was very much advantage, for we use the same thing on the Edmands as we have on the Eagle.

Q. I want to know whether you find any advantage either in use or construction?

A. Any difference in use and construction?

Q. Yes, whether you find any advantage in the Eagle patent over the Edmands patent.

A. I don't think so.

Q. Now just look at the Fairchild patent, defendant's exhibit J, and the model of the same, defendant's exhibit M. Now with the Fairchild patent before you and the Edmands patent before you, would you find, as a mechanic, any difficulty in providing in a wrench a socket support, a male socket support or square head, as they call it, as a means for holding that socket support in different angular positions with respect to the nut?

A. No trouble whatsoever.

Q. What would you think of a mechanic who found difficulty in making such a wrench?

A. I wouldn't call him a mechanic.

Q. State whether or not you find any advantage in the Edmands construction over the Eagle construction?

(Testimony of R. N. Shinn.)

A. Edmands over the Eagle; I don't see there would be any great advantage, only the cost of manufacture of the Edmands might be a little cheaper.

Q. Otherwise just about on a par?

A. I think so.

Q. Now I call your attention to the spring controlled pin (j) in Figure 1, of the Edmands patent. State whether or not you find the same piece in the Eagle patent, and if so refer to the piece by number.

A. Yes, it is (8) in the Eagle, and as you say, it is (j) in the Edmands. [69]

Q. Do you consider it as a good mechanical construction to use a pin as (8) shown in the Eagle patent, for the purpose of holding head (4) in different positions?

A. Well it is good for the time being, but it is more susceptible to wear than other devices.

Q. What device would you substitute for it?

A. Such as a ball, is better.

Q. I call your attention here to the construction in Defendant's Exhibit 'BB', to the means for holding that double socket support in different angular positions. Would you consider that a superior construction over the pin?

A. I would.

Q. Explain why?

A. The pin is more liable to be corroded or from dirt, grit and sand; they are liable to stick and hold up the compress the spring, and doesn't have any means to recompense that wear, whereas the ball does have means, by the ball coming out further as it wears.

Q. Was that construction such as shown there, of spring controlled friction ball, known some time back?

(Testimony of R. N. Shinn.)

A. Oh yes, as far as my experience runs, I think.

Q. Would you consider it as having been well known in 1920?

A. Further back than that.

Q. State whether you would consider the Eagle patent in view of using spring controlled pin instead of spring controlled ball, as an efficient wrench?

A. That would lessen the utility of the wrench?

Q. Is there any means provided in the Eagle wrench for holding the socket on the socket support (4)?

A. No, there is none shown.

Q. He refers in his specifications that he proposes to have a tight fit, and hold it by friction. Would you consider the holding of a socket on the socket support by friction, as an efficient means of connecting the parts?

A. No, I wouldn't, not unless there was a spring friction.

Q. What means would you suggest for holding the socket firmly but removably in place?

A. The same as shown here, this ball.

Q. Mention the exhibit to which you refer.

A. Exhibit 'BB', ball clutch."

Witness Shinn, on

Cross-examination,

referring to Defendant's Exhibit "BB" testified as follows:

"Q. Referring to that ball snap on the socket support, would you think it would amount to invention to insert one of those ball snaps?

A. Do I think what?

Q. Do you think it would amount to invention to insert

(Testimony of R. N. Shinn.)

one of those ball snaps on your socket support, to hold the socket in place?

A. It is an improvement; I think it would be.

Q. Would it occur to an ordinary mechanic?

A. It might occur to him, yes.

Q. Would it? Would a mechanic think of that, or would he not think of it?

A. Some would.

Q. What would you think of an ordinary or average mechanic skilled in the art, that is, in the art of wrench manufacturing, would that occur to him or not?

A. I believe it would. [70]

Q. Would a socket stay in place on the socket support without a ball snap if there was a relatively tight fit or not?

A. Would stay for a short time, and then would be falling off all the time.

Q. But it would operate for a time, you think?

A. For a time.

Q. And you think after a while, after a period of wear, it would loosen?

A. I know it would."

On further cross examination the witness testified that at the time of the trial he was temporarily employed as a machinist at the Steel Tank & Pipe Company, that he had never worked in a wrench factory, but he had worked in tool rooms where wrenches were made in different railroad shops and auto parts companies in Peru, Indiana, (Peru Automobile Parts Company) and at Kokomo, Indiana (Haines Automobile Company). The witness testified that while he was employed at the Haines Automobile Company at Kokomo, Indiana, he had used a wrench substan-

(Testimony of R. N. Shinn.)

tially identical with the wrench shown by the drawing of the Edmands wrench (Defendant's Exhibit "D") but that the slot had been closed and the socket support converted into a male connection for use with socket; that he used this wrench most of the time while he was employed by Haines Automobile Company; that he did not know how many such wrenches were used when he was employed by that company but guessed there may have been twenty-five used; that the employees of this company made the wrenches themselves; that the wrench was not called the Edmands wrench, but was called a hinged wrench; that he did not know who manufactured the wrench; that this wrench was not widely sold at that time; that since that time he did not know if many Edmands wrenches had been sold; that he had used a similar wrench when employed at the Model Gas Engines Works where he was employed after leaving the Haines Automobile Company; that he never took any of the wrenches described; that he never owned one; that the wrench he was referring to was pretty much like the Edmands wrench; that it may have deviated a little bit from the Edmands wrench but the principle involved was the same with the exception [71] that the slot was closed so that the socket support would not come off. He testified that the Peru Automotive Parts Company was not a tool manufacturing concern but was engaged in manufacturing different parts of an automobile, but that wrenches were made in the tool room of that concern. He further testified:

"Q. Referring again to the Edmands patent, which is Defendant's Exhibit 'D', you are a tool maker by trade?

A. Not expert tool. I have worked at the tool trade, but not for some time.

Q. Are you familiar with cost accounting, as regards tools?

(Testimony of R. N. Shinn.)

A. No, sir.

Q. Have you ever manufactured tools for the trade where cost accounts were kept?

A. No, I don't think I have.

Q. Well, when you were comparing the Edmands to the Eagle, you were speaking of the cost of manufacture of the wrench, and stated as a conclusion that it was probably less expensive to manufacture the Edmands wrench than the Eagle wrench. What did you base that conclusion on? Is that an estimate or guess, or is that based upon any experience of yours?

A. Experience I would go by; I say we made wrenches, and I would say just as cheap, might be a little bit cheaper to make the Edmands.

Q. Now in reference to that statement, you mean in time, expense of materials used, or both?

A. Time expense.

Q. Time expense. Now referring to the part (b) in the Edmands, and the part (g) in the Edmands, which are integral, that is with the socket head and the curved shank, how would that be manufactured? What tools and what time would it take to make one of these heads and shanks?

A. Tooling up would be the greatest job.

Q. What do you mean by tooling up?

A. Getting your tools to forge this out.

Q. What sort of tools would you use?

A. Drop forge tools and dies.

Q. Drop forging?

A. Yes.

Q. How would you make the element (3) in the Eagle patent, which is the bifurcated portion of the shank. Would

(Testimony of R. N. Shinn.)

that be drop forging, or would that be work under the hammer, or how would that be manufactured?

A. It would be drop forged.

Q. How would the element (4) be manufactured?

A. Well that could be milled out, or could be drop forged too. Could be milled out with a rolling machine.

Q. What is the respective cost with regard to the making of the element (4) and the cost of making elements (b) and (g) of the Edmands, one being drop forged, and the other being a milling operation?

A. What would be the entire cost?

Q. What would be the unit cost on each one of them?

A. I couldn't give you that, for I never kept any cost account. [72]

Q. Well you say in your experience you believe it would be cheaper. What is the basis of that conclusion?

A. Well, I believe it is easier to tool up for it. I couldn't give cost account, because I never kept cost.

Q. Speaking of tooling up, how much would it cost, and what would be the time, or what would be the expense of tooling up for manufacturing head (b) and head (g) of the Edmands?

A. Well I couldn't give that offhand. I would have to do quite a little thinking on that, and study.

Q. You gave us a conclusion it would be cheaper. What was the basis of that?

A. I say would probably. I said I believed would be cheaper tool up for it.

Q. Then you believe would be cheaper to tool up, as you call it, by making dies for drop forging, than it would be

(Testimony of R. N. Shinn.)

to set up a little head (4) in a milling machine. Is that what you wish the court to understand?

A. No, sir.

Q. So by reference to that, would be much more expensive to tool up for heads (b) and (g) than for the element (4)?

A. It would cost more to tool up for the drop forge, but you have sockets to figure on the other one.

Q. What do you mean by sockets?

A. Sockets used on these wrenches.

Q. Then you think that it would be quite an expensive operation, and that these ordinary sockets are quite expensive devices?

A. What do you mean by quite expensive?

Q. How would cost of socket (10) in the Eagle, compare with the head (b) in the Edmands in cost of production?

A. Well these Edmands would cost most, because you take the other part to put in with it.

Q. Then you think the cost of manufacture of (b) and (g) as an integral structure, would be less than the cost of Head (4) and socket (10) of the Eagle?

A. I believe it would, yes.

Q. Are those sockets such as (10), and which you refer to as ordinary sockets, aren't they sold in quite large numbers?

A. They are.

Q. Aren't they quite inexpensive?

A. Well what do you mean by quite inexpensive?

Q. What does a set of sockets cost?

A. It is according to how many sockets you want to get in a set.

(Testimony of R. N. Shinn.)

Q. What is the ordinary set, then?

A. An ordinary set might include half a dozen, and might include twenty.

Q. We will take a set of six. How much is the cost of a set of six sockets?

A. I haven't bought any; I don't know.

Q. You don't know what the cost of sockets is?

A. They keep changing right along, I suppose they do; I don't know what the cost is."

The witness testified that he did not buy sockets, that he had never bought any wrenches of the type of the Eagle Wrench or of the type exemplified by Defendant's Exhibit "BB"; that he had not used tools for six or seven years; that he did not know when [73] tools of the type illustrated by Defendant's Exhibit "BB" and Plaintiff's Exhibit "5" were first put into use; that in 1916 or 1917 when he had a shop in Dakota, he and his employees used a device similar to the Edmands wrench; that if he remembered correctly the head on the wrench referred to was substantially the same as character (g) of the Edmands wrench adapted to take a series of sockets such as (k) around its periphery; that the details of this wrench were not clear in his memory. He further testified:

"Q. You spoke of changing the Edmands wrench so that it would be a device such as the Eagle shows. You spoke that you could do that easily?

A. We did do it, yes sir.

Q. You made a device such as the Eagle shows?

A. We made a—instead of having a female socket in the Edmands, there was the same kind formed only it had a male connection to fit other sockets.

(Testimony of R. N. Shinn.)

Q. You rebuilt to—how many of these did you rebuild?

A. Well I don't know; as I say, the boys made them themselves; some of them made in the tool room.

Q. Just a few in this Haines. Did you make any other ones, except in this Haines factory?

A. I think so.

Q. Where?

A. I think in the Model Gas Engine Works in Peru, Indiana.

Q. Have you any of those at the present time, or were they left on the job?

A. A long time ago.

Q. Probably all been forgotten by this time, except in your own mind.

A. Yes, sir, I haven't used that for—I don't know particularly that type; have used lots of them in our own shops, but always change the tools anyway, if they don't suit us."

The witness testified that he was not an employee of the defendant P & C Tool Company but had known Mr. Peterson, the president of the defendant company for not more than a year; that he had met Mr. Peterson at the factory of the defendant company where he went after seeing some tools of the defendant company owned by friends; that he talked with Mr. Peterson concerning the designing of tools in which he was interested; that he was not in the designing business but friends among mechanics had asked him to design tools; that this avocation might be amateur, but that he had built pretty good wrenches. The defendant offered and there was received in evidence Defendant's [74] Exhibit "O", a model of the Eagle wrench with a part cut away.

(Testimony of R. N. Shinn.)

The defendant offered and there was received in evidence defendant's Exhibit "P" consisting of an adapter and socket which could be used with the Edmands female head or socket holder to convert the same into a male socket.

The witness

R. N. SHINN

was recalled by the defendant and on

Re-direct Examination

testified:

"Q. Now Mr. Shinn, please look at the claim in the Eagle patent, and I call your attention to Plaintiff's Exhibit 2, which is the Eagle patent, and calling your attention to the last element and the means carried by the handle, and engageable with the rounded end of the socket support to hold the latter in different positions.

Q. That is the last element of the Eagle patent. You will find it on Line 93, Page 1, Line 93 of the Eagle patent. Now please turn to the Helstrom patent, which is Defendant's Exhibit 'F'. Now I call your attention to number (30) in the Helstrom patent, and will ask you to state whether or not that also shows a means for holding the movable part of the wrench in position.

A. It does.

Q. However, it does not hold it in different positions?

A. No, sir.

Q. In only one position.

A. In position; it revolves one way only. It is in different positions there.

Q. Now I call your attention to the means provided, identified by (j) in the Edmands patent, Defendant's Ex-

Testimony of R. N. Shinn.)

hibit 'D' you may state whether or not that provides a means——

* * * * *

Q. That is the Edmands patent. Look at part (j) there, and state whether or not that shows a means for holding the movable member (b) in different positions?

A. It does.

Q. Now please look at the patent to Miller & Burg, No. 1,175,973 being Defendant's Exhibit 'H', and look at the Figure 1 there in particular, and state whether or not you will find there a means shown for holding the relatively movable member in different positions?

A. Piece No. 13.

Q. Please examine the patent to Miller & Burg, No. 1,302,197, that is, Defendant's Exhibit 'K', and state whether or not in that patent you will find means for holding the relatively movable members in different positions?

A. Member (k) did you say?

Q. No. Defendant's Exhibit 'K'.

A. Yes, I find member (6), Figure 3."

On Re-cross Examination

The witness referring to the quoted [75] testimony further testified:

"Q. Each of these devices which you have pointed out, work or seat in a pocket?

A. Not all, no.

Q. Which ones don't?

A. Miller & Berg's doesn't.

(Testimony of R. N. Shinn.)

Q. How would you describe these elements, as notches instead of pockets, or what would you call them?

A. They could be called notches, or grooves.

Q. Then they are shallow recesses, that would be a generic term, and an all inclusive term.

A. Not a shallow recess.

Q. Not shallow?

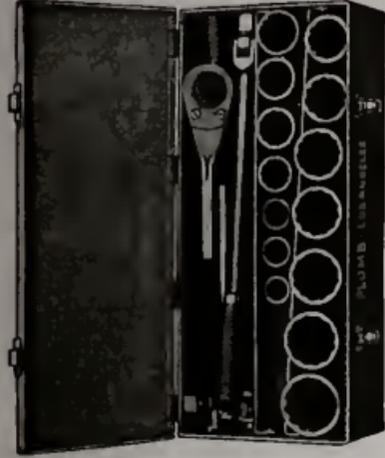
A. They may be termed that.”

M. B. PENDLETON,

recalled, testified on behalf of the defendant, that the tool marked in red ink with a pointing red line on page 28 of the catalog of the Plomb Tool Company (admitted as Defendant's Exhibit "Q") was one of the Eagle wrenches put out by the Plomb Tool Company. He testified that the adapter on page 28 of this catalog, designated as DXA3, could be used in connection with the Eagle wrench. The witness turned to page 18 of this catalog and identified the adapters on that page as being double male adapters which were the same as the adapter shown on page 28 with the addition of one part of a different type; that this additional part was the double male feature.

Defendant introduced two wrenches as Exhibits "A" and "B" filed in connection with their Interrogatories.

“Mr. GEISLER: Before Defendant rests, I desire to have Plaintiffs advise Defendant as to Plaintiffs' position on the question of infringement. Referring to Defendant's Interrogatory Exhibit 'A', this is made with a male plug to receive a socket on it. Defendant's Interrogatory Exhibit



SETS

- DDX-1—Popular Set: DDX15-16-17-18-20-22-23-24, DXE8, DXE10, DXSB, Weight of set in wooden box, 17½ lbs. Price per set.....\$13.65
- DDX-2—Same as above, in metal case..... 17.40
- DDX-3—Regular Set: DDX28 Socket, inc., DXE8, DXE16, DXSB, DXR12, DXA1. Weight of set in wooden box, 25 lbs. 6 oz..... 27.05
- DDX-4—Same as above, in metal case..... 30.80
- DDX-5—Complete Set. All sockets and attachments. Weight of set in wooden box, 38 lbs. 5 oz..... 44.70
- DDX-6—Same as above, in metal case..... 48.45

ADAPTORS



These adaptors enable Plomb sockets to be used with handles of other makes, or Plomb handles with other sockets.

No.	Weight	Price
DXA1—¾" Male x ¾" Male Plug	4	\$.60
DXA2—¾" Male and ½" Female Adaptor or Plug	3	.75
DXA3—¾" Female and ¾" Male Adaptor Plug for using Plomb handles with sockets of other manufacturers	8	.90
DXA4—¾" Female and ¾" Male Adaptor Plug for using Plomb sockets with handles of other manufacturers	7	.85

Dependable Exhibits Q



UNIVERSAL SOCKET WRENCH

A general purpose tool with thin walls, short couplings, light weight but of exceptional strength.

No tool kit is complete without a set of these wrenches.

No.	Weight Lbs. Oz.	Price
PI1—1½" —12 Point 18" T Handle—1	2	\$3.00
PI2—¾" —12 Point 18" T Handle—1	3	3.25
PI3—½" —12 Point 18" T Handle—1	6	3.50
PI4—¾" —12 Point 18" T Handle—1	6	3.75
PI5—1½" —12 Point 18" T Handle—1	8	3.75
PI6—¾" —12 Point 18" T Handle—1	8	3.75



DU18

18" T Handle Universal with short coupled ½ male plug. Weight ea. 1 lb. 6 oz. \$2.00



ADAPTORS

No.	Size	Weight	Price
5252	¾ Male x ¾ Male	1 oz.	\$.25
DA8	½ Male x ½ Male	2 oz.	.25
DA9	¼ Male x ¼ Male	3 oz.	.50
DXA1	¾ Male x ¾ Male	4 oz.	.80
DXA2	¾ Male x ½ Female	3 oz.	.75
DXA3	¾ Male x ¾ Female	8 oz.	.85
DXA4	¾ Male x ¾ Female	7 oz.	.85
DE3	¾ Male x ¾ Male 3" Long		.40



DRAG LINK SCREW DRIVERS

No.	Width Bit	Attach. Size	Weight	Price
DSDD12	1"	½ sq.	2 oz.	\$.66
DSDD16	1"	½ sq.	2 oz.	\$.85



DRH—Ratchet Extension Handle. Gives a Hand Hold below Ratchet.....\$.75

*Received
Filed July 11, 1932
C. H. Edmunds - Clerk*

(Testimony of M. B. Pendleton.)

'B' is made with a female wrench receiving part. The only difference between the two exhibits is the substitution of a female wrench-engaging part for a male wrench-engaging part. I call attention to the ruling of the Patent Office which occurs on page 10 of the file-wrapper, Defendant's exhibit 'L', Paper No. 2: The Examiner stated that the element B of the Mandeville patent, Defendant's Exhibit 'C', and the element 3 of the Miottel patent, Defendant's Exhibit 'G', are considered the equivalent of member 4 of the Eagle wrench. I want to know whether the failure by plaintiffs to introduce a wrench of the type of Defendant's Interrogatory Exhibit 'B' was because no infringement is claimed on that type of wrench.

* * * * *

"Mr. RAMSEY: It is Plaintiffs' contention that the handle and the female head shown in Defendant's Interrogatory Exhibit 'B' is not the equivalent and is not [76] claimed to be an infringement of the Eagle patent. However, when that has been modified by a coupler or adapter so that the wrench has a male head and can be used in combination with a common socket, then it approaches the Plaintiffs' patent; and if this Court holds that this patent is entitled to broad interpretation, Plaintiffs claim that Defendant's Interrogatory Exhibit 'B' when used with an adapter infringes the Eagle patent. If, however, the Court considers the Eagle patent to have a narrow interpretation, we wish the Eagle patent to be so limited."

Defendant introduced as Defendant's Exhibit "P" an

(Testimony of M. B. Pendleton.)

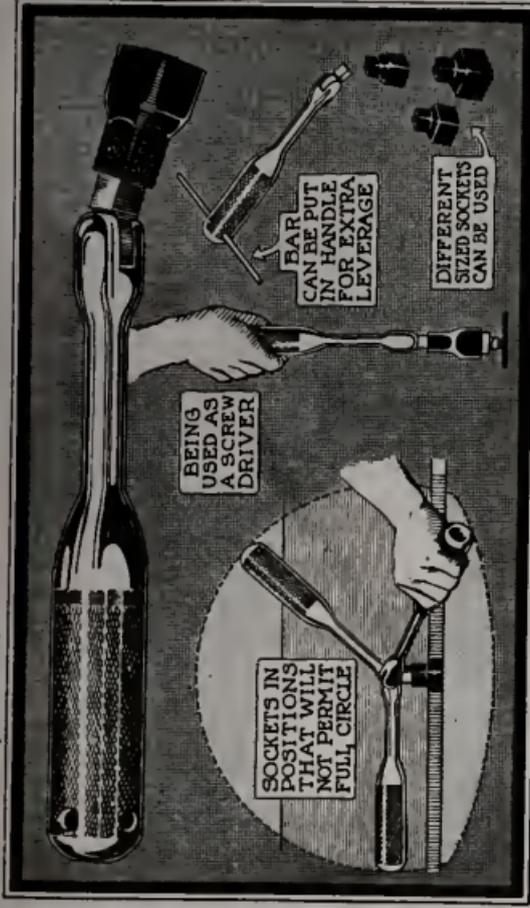
“Adapter” which can be used with Defendant’s Interrogatory Exhibit “B”.

It was stipulated that only the two pages referred to in the catalogue, Defendant’s Interrogatory Exhibit “Q”, are to be considered.

C. F. CARLBORG,

sworn as a witness on behalf of the plaintiffs in rebuttal, testified that he was a machinist and learned his trade in the first part of 1900 at St. Paul, Minnesota; that he had worked as a machinist at St. Paul about five years, came to Idaho in 1905 and worked at the machinist trade off and on until 1915 at Nez Perce, Idaho; that he was engaged in general repair work and automotive work at Nez Perce, and in 1915 became associated with Mr. Peterson, president of the defendant company; that he and Mr. Peterson were engaged in the repair business, both general machine and automotive repairs, at Payette Lake, Idaho, from 1915 until 1920 and in the latter year they went to Lebanon, Oregon; that they followed the same business until 1922. In 1922 he and Peterson started manufacturing tools at Lebanon, Oregon, and remained there until February 1, 1923 when they moved to Milwaukie, Oregon where they continued manufacturing tools for automobiles under the name of Peterson and [77] Carlborg, a corporation; that subsequently they formed the P & C Tool Company, a corporation; that it was his duty to look after the machinery used in the factory and with Mr. Petersen to design tools. He stated that when he was connected with the company he held the office of vice-president and handled the shop end of the business. The witness testified that he was familiar with the Eagle patent

Filed July 11, 1932.
G. H. Marsh, Clerk.



THE EAGLE SOCKET WRENCH

Showing various positions in which it may be used.

The Eagle Socket Wrench

THIS WRENCH has all the advantages of a ratchet combined with a simplicity all its own. It can be used in the most awkward places; it fits and reaches any and all nuts and bolt heads. When working at a bolt or nut which permits only half a turn, the hinged handle of the wrench can be brought through the half turn, then swung over to the original position and the full circle completed. When it is impossible to get a half turn, the handle stands straight away from the end of the socket and is turned by means of a punch through the holes provided, doing away with the annoyance always encountered in a job of this sort.

THE EAGLE WRENCH, carried in your tool-kit will save its purchase price time and again in labor and temper. You will find it so handy that you will be looking for opportunities to use it; you'll get rid of all the rattles and squeaks in spite of yourself.

THE EAGLE WRENCH is machined from a solid bar of cold rolled steel. Has no joints or welds anywhere. Consequently almost unbreakable. One moving part only and fits all makes of sockets.

List, \$4.50.

(Testimony of C. F. Carlborg.)

and the Eagle wrench and this type of wrench is generally called a flex-handle or hinge handle wrench. He stated that the P & C Tool Company started manufacturing the flex-handle wrench about 1925; that prior to that time, in 1922, a friend from Salt Lake City had handed him a picture of a handle and some sockets, but he had lost this picture. He was shown plaintiff's Exhibit "7" and testified that the type of wrench illustrated by that exhibit was the type pictured in the pamphlet which he had been given in 1922 except that the type illustrated in the pamphlet showed the handle in different positions, both ways, and that it had a number of sockets illustrated on the lower end. The witness said:

"Q. When were your efforts first directed to the designing of a wrench such as the Eagle wrench, which you say you started to manufacture in what year?

A. Well, we made up a sample in Lebanon, but it was altogether different from the other by not having any forked ends; these two—the socket holding device, and handle, we used them flat together with a pin or bolt.

Q. Holding them together?

A. To hold them together, yes, making a hinge.

Q. In other words, neither part a fork?

A. No.

Q. They both just lay alongside of each other?

A. Yes.

Q. That was in Lebanon?

A. That was in Lebanon.

Q. What were your next efforts to develop a wrench of the Eagle type?

A. I think about 1925.

(Testimony of C. F. Carlborg.)

Q. And what sort of a device did you design at that time?

A. We made a straight handle, and a forked bifurcated socket holder device, and a pin through to make a hinge."

The witness was handed Plaintiff's Exhibit "8", a copy of a patent issued to Mr. Petersen, president of the defendant company, and was asked if it represented the type of wrench which was next manufactured by the defendant company. The witness testified: [78]

"A. That is the type of wrench.

Q. And how does that differ from the present wrench which the defendant manufactures?

A. By having the—by having a straight handle and a forked socket holding device. We had either a square or a hexagon to hold the socket; Figure 1 being the handle, Figure 2 showing the socket holding device; that is Figure 5; with two—one forked end; that is attached with a pin to the flattened end of the handle, and a socket fitting on this square end. The flat handle also contained a small ball, with spring, or rather two, as it shows here, to form a friction against the sides of the socket holding member, so as to hold it in any position that you want it when you want to use the wrench.

Q. How long was that type of wrench manufactured by the defendant corporation?

A. It was manufactured as long as I stayed with the corporation.

Q. At what time—when did you leave the corporation?

A. 1929."

PLAINTIFF'S EXHIBIT 8.

Filed July 11, 1932.
G. H. Marsh, Clerk.

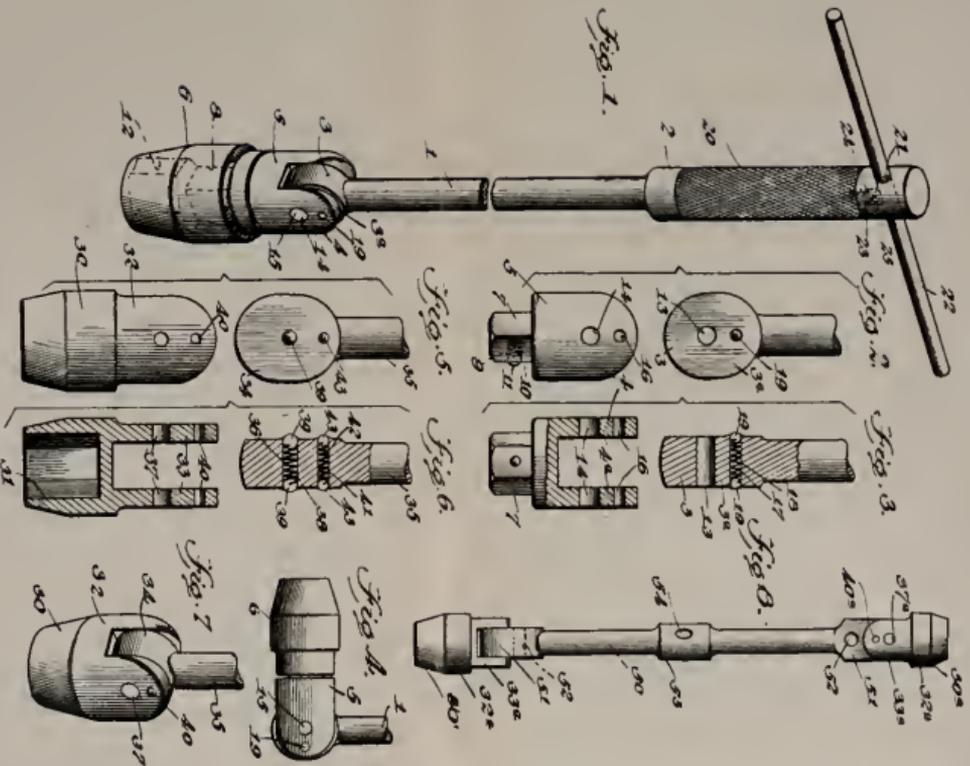
Sept. 27, 1927.

J. N. PETERSON

SOCKET WRENCH

Filed May 11, 1926

1,643,814



WITNESSES

James O. Peterson

J. N. Peterson,
INVENTOR
BY *Walter H. Lee*
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UNITED STATES PATENT OFFICE.

JOHN N. PETERSON, OF MILWAUKEE, WISCONSIN.

SOCKET WRENCH

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My invention relates to improvements in socket wrenches, and it consists in the combinations, constructions and arrangements herein described and claimed.

5 An object of the invention is the provision of a socket wrench having a wrench head hinged to a handle so that the handle may be disposed in axial alignment with the wrench head or at various angles with the axis of the wrench head and will be held securely, although releasably, against accidental swinging movement independently of the wrench head.

15 A further object of the invention is the provision of a wrench of the character described having novel and efficient spring actuated means for releasably connecting a handle with the wrench head of the device and for securing the handle against swinging accidentally from any one of a plurality of different angularly related positions to the wrench head.

20 A still further object of the invention is the provision in a wrench of the character described of a wrench head which comprises two coengageable separable sections, whereby socket members adapted for engaging with nuts or like members of different sizes and configurations may be used selectively with the remaining elements of the device.

30 A still further object of the invention is the provision of a wrench of the character described having socketed wrench heads at opposite ends of a handle.

35 Other objects and advantages of the invention will be apparent from the following description, considered in conjunction with the accompanying drawings, in which

Figure 1 is a perspective view of a wrench embodying the invention.

40 Figure 2 is a side elevation of cooperative coengaging elements of the handle and the wrench head of the device separated from each other.

45 Figure 3 is a view similar to Figure 2 at right angles thereto with portions of the cooperative elements of the wrench head and handle broken away and other portions being shown in section.

50 Figure 4 is a side elevation of the lower end portion of the wrench shown in Figure 1, showing the wrench head turned at right angles with the handle.

55 Figure 5 is a view similar to Figure 2, showing a modified cooperative part of a

wrench head and a handle embodying the invention.

60 Figure 6 is a view of the parts shown in Figure 5, the view being at right angles to Figure 5 and mainly in vertical section, portions of the handle being shown in elevation.

65 Figure 7 is a perspective view of the parts shown in Figures 5 and 6 as they appear when connected together and disposed with the handle in axial alignment with the wrench head, and

70 Figure 8 is a side elevation of a wrench embodying the invention and having wrench heads at opposite ends thereof.

A wrench embodying the invention includes a substantially straight rod-like handle 1 which may be enlarged from one end for part of its length as indicated at 2. The opposite end portion of the handle 1 may be enlarged as indicated at 3 to provide an attaching portion. This attaching portion may have substantially flat parallel side faces 3^a which lie in planes parallel to the longitudinal axis of the handle 1. This attaching portion 3 also may be formed to be substantially circular in configuration in a plane parallel to the axis of the handle 1. The attaching portion 3 of the handle is adapted to fit between the parallel inner faces 4 of ears 4 at one end of a section 5 of a wrench head which also includes a socket member 6. The section 5 of the wrench head has a portion 7 which is non-circular in cross sectional contour and which fits in a socket 8 in the upper end of the socket member 6. The portion 7 of the section 5 of the wrench head is provided with a lateral pocket 9 in which an expansion spring 10 is compressed between a latching ball member 11 and the inner end wall of the pocket 9. The ball member 11 protrudes from the pocket but is held against moving completely out of the pocket as a result of the actuation of the spring 10 in any suitable known manner, as by having the wall of the pocket 9 swaged inwardly at the outer end of the pocket so as to have a diameter slightly less than that of the ball member 11. However, the spring will function to hold the ball member in frictional engagement with the side wall of the socket 8 and thus will tend to hold the socket member 6 in place on the portion 7 of the section 5 of the head of the wrench. The

75 80 85 90 95 100 105 110

socket member 6 also has a socket, indicated at 12, in its lower end adapted to receive and engage with a nut, not shown, or like object. The socket 12 may be of any suitable non-circular configuration in cross section. The attaching portion 7 of the section 5 of the head also may be of any suitable configuration in cross section and the socket 8 of course will conform in cross section to the configuration of the portion 7 of the section 5 of the wrench head. It will be understood that a plurality of the socket member 6 may be provided, the respective socket members having sockets 12 of different sizes and different configurations in cross section and these socket members may be used interchangeably and selectively with the section 5 of the wrench head.

The attaching portion 3 of the handle of the wrench is provided with a transverse opening 13 which may be formed through the attaching portion 3 of the handle slightly below the transverse median line of the attaching portion 3 and across the vertical median line of the attaching portion 3. When the attaching portion 3 of the handle is in place between the ears 1, the opening 13 will be in register with transverse opening 14 in the ears 1. A pivot pin 15 extends through the aligned openings 13-14 so that the handle 1 is hingedly connected with the wrench head.

The handle 1 thus may be swung from axial alignment with the head of the wrench to positions at various angles to the head. It is desirable that the handle 1 shall be maintained in axial alignment with the wrench head more positively than in any other position and to this end, the ears 1 may be provided adjacent to their upper ends with aligned transverse openings 16. The attaching portion 3 of the handle is provided with a transverse opening 17 in position to register with the openings 16 when the handle 1 is in axial alignment with the wrench head. An expansion spring 18 is disposed in the transverse opening 17 and projects at its opposite ends against ball-shaped latch members 19 which are prevented from moving completely out of the opening 17 in any suitable known manner, as by swaging the walls of the opening 17 inwardly at the ends thereof to have diameters less than the diameters of the ball members 19. The ball members 19 are permitted to protrude from the opposite ends of the opening 17 into the adjacent ends of the openings 16 when the handle 1 is in axial alignment with the wrench head and a considerable force therefore must be exerted on the handle to swing it from the position shown in Figure 1 to a position at an angle with the longitudinal axis of the wrench head, as for example to position to extend at right angles with the longitudinal axis of

the wrench head, as shown in Figure 4. When the handle 1 is disposed at an angle with the longitudinal axis of the wrench head, the latch members 19 will be pressed by the spring 18 against the walls of the ears 4 and the friction will be sufficient to maintain the handle 1 in a given angular relation with the longitudinal axis of the wrench head until the angular relation of the handle 1 with the longitudinal axis of the wrench head is changed as a result of the application of a considerable force. The enlarged end portion 2 of the handle 1 may be knurled or otherwise roughened for part of its length, as indicated at 20 so that it can be conveniently gripped in the hand of the user. In addition, the upper end portion of the enlarged portion 2 of the handle is provided with a diametrical opening 21 for the reception of a removable cross bar 22 which can be gripped and manipulated to turn the handle 1 about its axis. A vertical pocket 23 is provided in the enlarged end portion 2 of the handle in position to interposed the transverse opening 21. An expansion spring 24 is disposed in the pocket 23 and presses a ball member 25 against the cross bar 22, thus preventing accidental axial movement of the cross bar 22.

From the foregoing description of the various parts of the device, the operation thereof may be readily understood. The wrench head and the handle 1 may be disposed at various angles to each other and will be releasably held in any given angular relation by the spring pressed latch means hereinbefore described. The device therefore can be manipulated to turn nuts or similar objects which are located at places inaccessible to a rigid socket wrench. Also, the handle 1 may be swung to a desirable angular relation with the longitudinal axis of the wrench head after the wrench head has been engaged with a nut or like member so that a relatively great leverage may be exerted on the nut or like member to effect turning of the same. The handle 1 will be more securely held in place and against swinging about the axis of the pivot element 15 when the handle 1 is in alignment with the wrench than in any other angular relation to the longitudinal axis of the wrench head. The handle 1 and the section 5 of the wrench head can be used with socket members 6 having sockets 12 of different sizes and configurations formed thereon and the device thus is adapted to have a relatively wide range of utility.

The wrench head of the modification which is partially exhibited in Figures 5 to 7 inclusive is formed in a single piece and comprises a socket member 20 having a socket 21 in its lower end of suitable size and configuration in cross section to receive and engage with a nut or other object that is to be

turned. The socket member 30 is integral with a connecting member 32 which has a pair of upstanding spaced ears 33 adapted to straddle an attaching end portion 34 of a stem 35. The attaching end portion 34 is similar to the attaching portion 3 of the handle 1 and is provided with a relatively large transverse opening 36 in the same position in the attaching portion 34 of the handle as the transverse opening 13 in the attaching portion 3 of the handle 1. The transverse opening 36 is adapted to register with aligned transverse openings 37 in the ears 33. The openings 37 are of less diameter than the opening 36. An expansion spring 38 is disposed in the opening 36 between a pair of ball members 39 which are urged to positions to protrude from the ends of the opening 36 into the openings 37, whereby the handle 35 will be pivotally and detachably connected with the member 32 of the wrench head. The ears 33 also are provided with smaller aligned transverse openings 40 and the attaching portion 34 of the handle 35 is provided with a transverse opening 41 which will be disposed in alignment with the openings 40 when the handle 35 is in axial alignment with the wrench head 32-39. An expansion spring 42 is disposed in the transverse opening 41 between a pair of ball-shaped latch members 43 and urges the ball-shaped latch members 43 to positions to protrude from the ends of the opening 41 into the openings 40, whereby the handle 35 will be releasably held in axial alignment with the associated wrench head but can be swung as a result of the exercise of a considerable force to various angles with the longitudinal axis of the wrench head. The ball-shaped latch members 43 will engage with the inner faces of the ears 33 when the handle 35 is in any position to which it may be swung about the aligned axes of the ball-shaped pivot and latch members 39 and thus will tend to maintain the handle 35 in any given angular relation to the longitudinal axis of the associated wrench head. A plurality of the wrench heads 30-32 may be provided, the respective wrench heads being identical with one another in essential respects but having sockets 31 of different sizes or different configurations in cross section and these respective wrench heads may be used interchangeably and selectively with the handle 35.

The modified form of wrench shown in Figure 8 includes a handle 50 having enlarged attaching portions 51 at each of its opposite ends. The attaching portions 51 at the opposite ends of the handle 50 are at right angles with each other. Each of these attaching portions 51 may be identical in essential respects with the attaching portion 34 on the handle 35, the only difference being that the attaching portions 51 are rela-

tively longer than the attaching portion 34. A wrench head is provided for each of the attaching portions 51 and may be identical in essential respects with the wrench head 30-32 and therefore has been indicated by the same reference characters as the wrench head shown in Figures 5, 6 and 7, with the letter *a* added to each of such numerals. Each attaching portion 51 of the wrench handle 50 may be connected pivotally with the ears 33^a of the associated wrench head in the same manner as the attaching portion 34 of the handle 35 has been described as being attached to the ears 33 of the wrench head shown in Figures 5 to 7 inclusive. Latching means, identical in essential respects with that which has been described as being used with the forms of the device shown in Figures 1 and 5 to 7 inclusive also will be provided for releasably holding each wrench head of the modification shown in Figure 8 against swinging accidentally about the axis of its pivotal connection with the handle 50. The inner end portion of each part 51 of the handle 50 may be provided with a transverse opening 52 through which the cross bar 22 or a similar bar may be projected for use in turning the wrench. In addition, the middle portion of the handle 50 may be enlarged as indicated at 53 and provided with a transverse opening 54 which also is adapted to have the cross bar 22 projected therethrough.

Obviously, the invention is susceptible of embodiment in forms other than those which are illustrated in the accompanying drawings, and I therefore consider as my own all such modifications and adaptations thereof as fairly fall within the scope of the appended claims.

I claim:-

1. A socket wrench comprising a handle, a socket wrench head, pivotal means connecting said handle with said head, the axis of said pivotal means extending at right angles with the longitudinal axis of said handle, the handle having a transverse opening and said head having transverse openings adapted to register with the openings in said handle when the handle is axially aligned with said wrench head, an expansible spring disposed in said transverse opening in the handle, and a pair of ball-shaped latch members disposed in the opposite end portion of the transverse opening in said handle against the opposite ends of said spring and adapted to be moved by said spring to positions to protrude from the opposite ends of said transverse opening in the handle into the adjacent ends of the transverse openings in the head when said handle is axially aligned with said wrench head and to frictionally engage with the faces of said head when said handle is in angular relation to said wrench head.

2. A socket wrench comprising a handle having an enlarged attaching portion at one end, said attaching portion having a pair of opposite parallel faces, a socketed wrench head having a pair of ears straddling said attaching portion, the inner faces of said ears being disposed flatwise against said parallel face of said attaching portion, pivot means connecting said attaching portion of the handle with the ears, the axis of said pivot means extending at right angles with the longitudinal axis of said handle, said attaching portion of the handle having a transverse opening and said ears having transverse openings adapted to register with the transverse opening in said attaching portion of the handle when said handle is axially aligned with said wrench head, said transverse openings in said ears being of less diameter than said transverse opening in said attaching portion of the handle, an expansion spring disposed in said transverse opening in the attaching portion of the handle, and a pair of ball-shaped latch members disposed in the opposite end portions of the transverse opening in said attaching portion of the handle against the opposite ends of said spring and adapted to be moved by said spring to positions to protrude from the opposite ends of said transverse opening in the attaching portion of the handle into the adjacent ends of the transverse openings in the ears when said handle is axially aligned with said wrench head and to frictionally engage with the inner faces of said ears when said handle is in angular relation to said wrench head.
3. In a socket wrench, a handle having an enlarged attaching portion at one end, said attaching portion having a relatively large transverse opening formed therethrough and also having a smaller transverse opening located inwardly of said first named transverse opening, both of said transverse openings intersecting the longitudinal axis of said handle, a wrench head having a pair of ears straddling said attaching portion of the handle, said ears having a pair of aligned transverse openings adapted to register with said first named opening in the at-

taching portion of the handle, said ears also having a pair of aligned transverse openings adapted to register with the second transverse opening in the attaching portion of the handle when said handle is axially aligned with said wrench head, coiled expansion springs disposed in said transverse openings in said attaching portion of the handle, ball members disposed at the opposite ends of each of said expansion springs, the expansion spring in said first named transverse opening in the attaching portion of the handle acting to urge the ball members at the ends of said expansion spring to positions to protrude from the ends of said first named transverse openings in the attaching portion of the handle into the associated transverse openings in said ears, whereby said handle will be pivotally and detachably connected with said ears, the expansion spring in the second transverse opening in the attaching portion of the handle acting to urge the ball members at the opposite ends of said second named expansion spring against the inner faces of said ears when said handle is disposed at an angle with the longitudinal axis of said wrench head and into the adjacent ends of the associated transverse openings in said ears when said handle is axially aligned with said wrench head.

4. In a socket wrench, a substantially straight rod-like handle having an attaching end portion enlarged and formed to be substantially circular in configuration in the plane of the longitudinal axis of the handle, said attaching end portion having flat opposite faces, a wrench head having a pair of ears straddling said attaching end portion of the handle, the inner faces of said ears being in contact with said flat opposite faces of said attaching end portion of the handle, pivot means connecting said ears with said attaching end portion of the handle, and a spring pressed ball-shaped latch member carried by said attaching portion of the handle in frictional engagement with the inner face of one of said ears.

JOHN N. PETERSON,

(Testimony of C. F. Carlborg.)

The witness testified that in 1926 a wrench of the design of Defendant's Interrogatory Exhibit "A" was designed and manufactured. This wrench had a bifurcated handle with a socket support having a circular end and a square end to fit a socket. He stated that the wrench described in the Peterson patent, Plaintiff's Exhibit "8", cost more to manufacture as it took slightly more material than the wrench exemplified by Defendant's Interrogatory Exhibit "A" and that the wrench made on the Eagle pattern (Defendant's Interrogatory Exhibit "A") would operate in a smaller space. He said:

"A. It goes into a smaller space this way, where the automobile motor, or any place in the automobile, will be a projection over the nut or bolt you have to take out, and you get in with this in a smaller space.

Q. Smaller space than what?

A. Than the Peterson flex handle.

Q. And when speaking of the Peterson flex handle, you mean the wrench made in accordance with the Peterson patent, which is Plaintiff's Exhibit '8'?

A. Yes.

Q. In demonstrating, and for the purpose of the record, when you were saying that this will go into a shorter space, you are pointing to the socket support and socket in place?

A. Yes.

Q. Measured from the pivot axis to the mouth of the socket which is adapted to engage the nut?

A. Yes.

Q. You were in court when Mr. Shinn, who is one of the defendant's witnesses, explained the difference in cost of

(Testimony of C. F. Carlborg.)

manufacture between the wrench made in accordance with the Eagle patent, and the one made in accordance with the Edmands patent. I will ask you to refer to Defendant's Exhibit 'AA', which shows the Edmands wrench, and Plaintiff's Exhibit 2, which shows the Eagle patent, and compare those wrenches shown in the patents, on a cost basis. Which wrench would cost the most to manufacture? [79]

A. The Edmands patent, the Edmands wrench.

Q. How much more would it cost, in your opinion?

A. The cost would be at least double.

Q. When you were in the manufacture of tools with the P & C Tool Works, and before that, your experience embodied the manufacture of tools, and the method of making tools?

A. Yes.

Q. Will you explain to the Court the operations required in making Edmands head and the integral ears, and the operations required in making the Eagle socket support and the form of standard sockets which it is adapted to engage, from a cost basis, bearing on operation.

A. The handles of the two wrenches in question are identical in manufacture.

* * * * *

A. I say that the two handles, the handles of the two wrenches in question, the Edmands patent and the Eagle patent, are identical in manufacture, the two handles; but the head for the Edmands wrench—the heads for the Edmands wrench are a series of sockets with a holding device solid with the socket, and it requires at least five more operations to make those sockets, than to make the regular socket.

(Testimony of C. F. Carlborg.)

Q. Now refer to the socket support in the Eagle.

A. The socket support of the Eagle wrench is very inexpensive requiring just a short piece of square steel, that is made semi-circular on one end, and a hole driven for the ball to have—The Edmands wrench has a socket with a device that enters the opening in the handle, which got to be on each socket. As I say, each socket has at least five more operations to it than a regular socket has, that can be drilled out of a piece of steel, and forged with a small amount of labor.”

The witness testified that he was familiar with the use of wrenches of the character of Edmands and Eagle wrenches; that his first experience with wrenches was as an automobile mechanic; that at said time automobile mechanics had sockets which consisted of a handle with right and left hand ratchets and a number of sockets made out of pressed steel; that garage mechanics at that time had T handle wrenches made by blacksmiths; that the average mechanic from about 1915 to 1920 and later possessed as high as 150 pounds of wrenches, aggregating about 100 wrenches; that it was necessary to have this number of wrenches in order to do the work in different places on motors and the chassis of automobiles. Mr. Carlborg testified that one wrench would not suffice because there were nuts and bolts of different sizes and that certain operations required wrenches of special design. Respecting this latter matter, he said: [80]

“A. There were places on the motors and chassis of the car that required a wrench of a special design, because there were places that were hard to get at.”

The witness testified that since the introduction of flex-handle wrenches the average automobile mechanic is not required

(Testimony of C. F. Carlborg.)

to possess as many wrenches as formerly because the flex handle wrench, with a set of sockets, is capable of being used on most of the work done on a motor; that about three flex handles of different sizes and about 26 sockets were sufficient for the average mechanic at the present time. He stated that prior to the introduction of the flex handled wrench the average mechanic was required to purchase from \$200 to \$250 worth of wrenches. He further testified:

“Q. Do you know whether mechanics generally, and you personally, put any thought on the devising of a wrench which would eliminate this vast number of wrenches, during this period of time which you spoke of?

A. Yes, we spent lots of time on designing wrenches.

Q. Did you personally spend any time on attempting to solve this problem, or not?

A. I have some, yes.”

The witness said that the defendant company manufactured as many flex handle wrenches as all other types of handles combined and that the experience of the defendant company was the same as the experience of the Plomb Tool Company, as testified to by Mr. Pendleton. He testified that he was subpoenaed as a witness in the case and did not bear any ill-will towards the defendant company. He said that in his experience as a mechanic from 1900 to the date of the trial he had never seen a wrench of the type shown in the Edmands patent nor of the type shown in the Fairchild patent. (Defendant's Exhibit “J”)

On Cross Examination

Mr. Carlborg testified that he severed his connection with the defendant corporation in the fall of 1929 because of a disagreement. He further testified:

(Testimony of C. F. Carlborg.)

“Q. I call your attention to Plaintiff’s Exhibit 8. Please look at the member (5) of Figure 1. [81]

A. Member (5), yes.

Q. That is the piece which is movable relatively to the handle—it is pivoted in place; that is correct, isn’t it?

A. Yes.

Q. Now that piece could be made as shown in Figure 5, or as shown in Figure 2?

A. Yes.

Q. Figure 2 showing a male connecting part, and Figure 5 showing a socket part?

A. A socket solid with the forked end.

Q. That was interchangeable just as the mechanic saw fit to use it.

A. Not very well, because it had to be riveted with a rivet, to the handle, with room enough so it could move.

Q. Well it would be a simple thing to take out a rivet, would it not?

A. Well you could, yes.

Q. And then put one piece on there just as the mechanic wanted?

A. He could, but would not be very convenient.

Q. Any mechanic could do it, couldn’t he.

A. No.

Q. No mechanic? You say a mechanic couldn’t do it?

A. Not very well.

Q. An expert mechanic couldn’t remove a rivet?

A. Yes he could, or he could.

Q. Now you can read patent drawings, can’t you?

A. Yes.

Q. I am going to—can you read a claim of a patent? Have you had an experience with patents?

(Testimony of C. F. Carlborg.)

A. Some, yes.

Q. You can read a claim of a patent?

A. Yes.

Q. Now you look at the claim of the Eagle patent. The Eagle patent is Plaintiff's Exhibit 2. Now the first piece described there, what we will term an element, is a handle having a bifurcated shank. You see that, don't you?

A. Yes.

Q. Now there is nothing new in making a handle with a bifurcated shank, is there?

A. Why no, I don't suppose.

Q. From a mechanic's standpoint.

A. No, of course it would not be; but the idea of the use that you would want to put it to, would make it new.

Q. Now I am going to ask you to look at the Miottel patent, which is Defendant's Exhibit 'G'. [82]

Mr. RAMSEY: At this time the plaintiff objects to the attempt to qualify this witness as an expert on patent matters, on cross examination, unless the defendant wishes to make him his own witness. These questions were not gone into on direct.

COURT: Sustained."

* * * * *

"Q. You say that there is an advantage in the construction of the Eagle patent, in that you can get that piece (4) with a socket on it, in a smaller space?

A. Yes.

Q. What other advantage do you find in the Eagle patent?

A. It is a little cheaper to manufacture, because it is easier to make it; it is easier to make the handle; that forked

(Testimony of C. F. Carlborg.)

handle, out of just a square piece of steel, than to take a round piece of steel and mill that other, or forge it and then mill it square to hold the socket; that requires some work and slightly more material.

Q. From your experience with the wrench invented by Mr. Peterson, that is, Plaintiff's Exhibit 8, Peterson's wrench, No. 1,643,814, is it not a fact that in the use of that tool it frequently occurred that the fork on the part (5) broke in use?

A. That particular part (5)? [83]

Q. Yes, part (5) looking at Figure 1.

A. Do I understand you?

Q. That it broke?

A. Broke?

Q. Yes, broke away in use.

A. It sometimes does.

Q. Now when you broke a fork on the handle itself, there would be a breakage of that tool, would there not?

A. Of course there is not anything made but what it can be broken, but if it is heat treated in the right manner, it is very hard to break either one of them.

Q. If the fork broke, which is part of the handle, if that broke you would have to make a whole new handle, wouldn't you?

A. Yes.

Q. Whereas, if the fork broke on the part (5) you would only have to make that part (5)?

A. Yes."

On Re-direct examination

the witness testified that wrenches with forked handles did not break any more frequently than handles of other designs; that

(Testimony of C. F. Carlborg.)

breakage would not occur if the heat treatment was right; that breakage was a rare occurrence. The witness stated that he heard the testimony of the defendant witness, Mr. Kelly, and testified with respect to the opinion of the witness Kelly that a wrench of the Eagle type in active use might be worn out in a week's time, that:

“A. My experience is this, that they will last for years. I have been using both kinds, and have used them for the last three years, not every day, but a good deal of the time, and they are still as good as ever.

Q. What was the experience with the defendant corporation with regard to replacement of wrenches for undue wear? What was their experience, and what was their policy in regard to replacement?

A. If it breaks through faulty material or workmanship, it was replaced.

Q. Was that replacement on account of wear a rare occurrence, or a frequent occurrence?

A. No, just on breakage.

Q. You say on breakage it was rare?

A. On breakage.

Q. What about wear, undue wear?

A. They were not supposed to replace on undue wear, because there were none of them that would wear out in a year's time.”

J. J. BUHLER

was called as a witness in rebuttal by the plaintiff and testified that he was a sales representative of the Plomb Tool Company in Oregon, Washington and Northern Idaho; that he had been a salesman since 1929, handling sales in California from February 1, 1929 until January 1, 1932 when he commenced acting as [84] salesman in Oregon, Washington and Northern Idaho; that prior to becoming a salesman he had been an automobile and truck mechanic for the General Petroleum Corporation from 1922 until February, 1929; that his duties consisted of repairing and overhauling tractors, trucks and making general repairs; that as a salesman he sold the Plomb tools consisting of handles, wrenches, standard sockets, ratchets, punches, chisels, etc. and that he sold them to jobbers and mechanics; that he did not stress any particular kind of tools but that "the tool game is mostly sockets and handles". The witness testified that he did not carry any of the old style wrenches such as T-wrenches, speed wrenches, etc. but that occasionally he sold a T handled wrench when it was ordered "out of the catalog". Defendant's counsel admitted that the plaintiff had a large commercial sale for the Eagle wrench. The witness testified as compared with the ratchet wrench T-handles and L-handles adapted to the ordinary socket set, the sale of the flex handled wrenches was equal to the sale of the other handles combined. He testified that when he worked for the General Petroleum Company as a mechanic, from 1922 to 1929, there was in use solid wrenches of various kinds, standard sockets for which handles were specially made in order to make them usable in difficult places, punches, chisels and similar tools. Buhler testified that during the period he was employed by the General Petroleum Corporation a good mechanic who took pride

(Testimony of J. J. Buhler.)

in his work would have possibly 200 wrenches whereas an indifferent mechanic would have 25 and borrow other needed tools from other employees. He testified that the first flex handle wrench he saw was in 1928 and that following the introduction of this wrench practically every employee in the shop at the General Petroleum Corporation bought from one to three of these wrenches. He testified further:

“Q. Did they, or didn't they, discard their old wrenches?

A. Yes, pretty much so.”

He said that there were approximately 30 mechanics regularly employed and that they all adopted the flex handled wrench. The witness testified that a mechanic with flex handled wrenches would discard half of the [85] wrenches formerly used; that is, that two or three flex handles served as a substitute in the kit of the average mechanic for from ten to one hundred special wrenches. He said that when he was working as a mechanic most mechanics had standard socket sets, but that they did not use them very much until the flex-handle was introduced. Asked to explain, he testified:

“Well if he wanted to save any time, and happened to get into a tough place his socket wouldn't go in, his handle wouldn't work, and then he would either take handles he had already made and invented for that particular job, and use it, and the first thing you know he had a flock of handles, and he gradually got out of the habit of using very many sockets, or would ruin them making them perform from one tough job to another.”

He said that when the flex handle wrench was adopted standard sockets became more generally used. Asked to explain the

(Testimony of J. J. Buhler.)

reason for the more general use of the standard sockets, after the introduction of the flex handle wrench, he testified:

“A. You take your average mechanic with about ten or twelve sockets, and go out on the road on a job, with these one or two flex handles could do practically all the work he done before, when he took seven or eight handles.

Q. Why does the flex handle lend itself to the specific use on the standard sockets? Just explain that; if you care to give examples of how that—what sort of work you do with them, and why. We are not mechanics, and we don't understand.

A. I could show you if I had a handle. Most of your mechanic's work is one hand; he is holding some part with his other hand, and he will be bracing himself to reach into a tough spot, and he is working with one wrench, for instance, on a machine; a great part of your mechanical work is working inside the motor, or tearing it down; if you are putting up a connecting rod, or bearing, with two halves, he would be using one hand, holding half the bearing, and keeping his sheaves lined up, and also keeping that half from falling down. He could use the wrench with one hand, and if the bolt or nut happened to be turned here, he could tip the wrench up,—if this was a nut or bolt he could tip the wrench that way and bring it around and it comes back and he can do it here, and at the same time he has never let go with one hand. That is why I think most mechanics like it flexible, it permits him to use one hand on the wrench.”

The witness testified that as a rule mechanics were required to buy their own tools and when seeking employment inquiry was always made as to whether or not the applicant was sufficiently

(Testimony of J. J. Buhler.)

supplied; that the average mechanic prior to the introduction of the flex handle [86] wrench had an investment of from \$250 to \$300 in tools. He testified that in some shops, in Ford shops particularly, mechanics are instructed to discard obsolete handles and to confine their tools to sockets and flex handles. Asked as to the average investment of a mechanic since the introduction of flex handles, to possess a kit of tools equivalent to the old type wrenches, he said:

“Q. Approximately what would their average investment be now, with these flex handles, to get an equivalent kit of tools?”

A. The investment would be considerably less in tools; in money, in cash dollars and cents, there wouldn't be so much difference. In the old days you had a cheap grade of tools that were sold from Sears & Roebuck, or something like that, and it wasn't practical for your average mechanic to use, and he had to make, he bought a number of them, and he made the rest of them, so his investment, so far as cash money, wasn't very much, but the time spent in making them, whether he was working for a company, or working for himself, was considerable, as far as time was concerned, if his time was worth anything.”

The witness was asked for his opinion concerning the Edmands wrench (Defendant's Exhibit “AA”) and the wrench of the defendant on the pattern of the design of the Eagle wrench, marked Defendant's Exhibit “BB”. He testified as follows:

“Q. The Edmands wrench is Defendant's Exhibit ‘AA’. Now will you from a mechanic's viewpoint, and from a user's viewpoint, compare Defendant's Exhibit ‘AA’ and Defend-

(Testimony of J. J. Buhler.)

ant's Exhibit 'BB', and point out the superiority of one over the other, if you find such superiority, in use or in construction.

A. Exhibit 'AA', when that hinge is down, is more or less, seems sloppy, that is, a lot of lost motion; I don't believe if you are holding something in one hand, and try to hinge it down to advantage, you could do that; you might have to take two hands; it seems to kind of catch in the slides out a little ways. In other words it don't come back all the way here, like this; you can't hardly move it, it locks that way.

Q. Why is that? Possibly it would be easier if you also had a copy of Defendant's Exhibit 'D', which is a copy of the patent specifications, so when you refer to the parts in that wrench you can refer to them by the numbers on the drawings. Can you read drawings?

A. I don't understand drawings.

Q. Well, you could see the numbers probably on the drawings, and point them out.

A. I will try. The reason it won't hinge over easily is that there is a recess back in here that is deeper than the pin, so when it is in that position it will hinge; but there is so much slack there when it comes over here the recess is not so big, and it just don't hinge; you would have to take two hands and shove it back that way, [87] to move the wrench.

Q. In other words, look at Figure 6 in that Edmands drawing; that recess you speak of is (i).

A. The small recess looks to be (i), and the large recess seems to be (h).

Q. And is, or is not, the hinge pin on that socket head, in the Edmands, fixed to the head or fixed to the shank?

(Testimony of J. J. Buhler.)

A. I don't understand what you mean by the head of the shank.

Q. You have a socket head in your left hand.

A. That is the socket head.

Q. And have a wrench in your right hand. Which carries the hinge pin, the handle or——

A. The handle carries the pin.

Q. Is that pin (f) in the Edmands round, or is it flattened?

A. (f) where?

Q. Is it in Figure 1 of the Edmands, and also the model you have in your hand.

A. As much as I can see the pin, it is flat; round on the sides, flat on two sides, and round on two sides.

Q. And when the flattened part of that pin which is in—the flattened part of the pin gets out of that slot (i), that is when it locks?

A. Yes, in that position.

Q. In the use of the flex wrench is its essential that that wrench get in that position?

A. No, it shouldn't get into that position; instead of locking you should have it so it is free, could be turned around.

Q. Now comparing—you say that it has two advantages, one that it necessarily must be a one-handed wrench, and the other, that it is adapted to use standard sockets.

A. Yes.

Q. Is the Edmands device adapted to use standard sockets?

A. No, you couldn't use standard sockets with that, because there is no place to put standard sockets on here.

(Testimony of J. J. Buhler.)

Q. A mechanic understands standard, or usual sockets, to mean what?

A. A socket, a round socket, with a hole through both ends.

Q. Is the hold circular or non-circular? Do you understand what I mean?

A. No, I don't.

Q. Is the hole round, or is it angular in sections, the bore through the socket? Have you a socket there?

A. No, I haven't. I mean by a socket—

Q. Is that a standard socket, or not?

A. That is a standard socket.

Q. And that comprises what, to a mechanic?

A. One end fits the nut, and there is a hole through the other end for a handle.

Q. And the hole is angular instead of circular, the hole going through, so it won't turn around?

A. Yes.

Q. And you think that the Edmands wrench couldn't be used with one hand.

A. No, you would have a hard time using it with one hand, to get any speed or anything out of it; also he would be afraid it would drop off in using it in this position on a manifold, unless you happened—if you were working in the dark, or unless you were watching real close, you would be picking this thing on and off all the time; it would be bothering."

On Cross-examination,

the witness further testified: [88]

“Q. The Edmands wrench you would call a flex wrench just the same as the Eagle wrench, wouldn't you?

(Testimony of J. J. Buhler.)

A. No.

Q. Not a flex wrench.

A. No.

Q. Why isn't it?

A. Because it has a tendency to lock when you are using it with one hand.

Q. Is it in its general construction a flex wrench, intended for that use?

A. I couldn't say.

Q. You are not a trained mechanic?

A. Sir?

Q. You are not a trained mechanic?

A. I am a trained automobile mechanic, yes.

Q. Now taking the Edmands wrench, and taking that piece off there, that socket piece, and putting a hinge lug there, a male part, will that involve any difficulty to an ordinary mechanic?

A. How do you mean put an ordinary lug?

Q. Just take that piece off and replace that, and hinge permanently in place a male socket holder, could an ordinary mechanic do that if you asked him to?

A. No.

Q. He couldn't? That is all."

STEWART S. TUFTS,

a Barrister and Solicitor, practicing at Vancouver, British Columbia, was called as a witness on behalf of the plaintiff and testified that the plaintiffs Eagle and Langs were his clients and

(Testimony of J. J. Buhler.)

that acting in pursuance of their instructions he wrote a letter dated September 13, 1930 (Plaintiff's Exhibit 9) to the defendant company at 406 Burnside Street, Portland, and on September 27, 1930 wrote another letter (Plaintiff's Exhibit 10) to the defendant company at Milwaukie, Oregon; that he received a response to the letter dated September 27, 1930 by a letter from the defendant company dated October 2, 1930 (Plaintiff's Exhibit 11). These letters were received in evidence.

M. B. PENDLETON

was recalled by the plaintiff as a rebuttal witness and testified that during the period 1922 to 1929 it was his duty on behalf of the Plomb Tool Company to interview all inventors who came to the factory with ideas for the improvement of mechanic's tools; that during that period there was a repeated demand for some improvement in handles which could be used with the standard socket then in possession of garage mechanics; that during that period the Plomb Tool Company spent "a good many hundred dollars" attempting to [89] devise some sort of a jointed wrench which would meet the apparent demand. He said that his connection with the Plomb Tool Company began in 1918 and although it was not his responsibility until 1922 to interview inventors, he nevertheless saw them at the factory and examined various devices for the improvement of mechanic's tools; that his experience prior to 1922 was the same as it was subsequent to that date so far as the demand for a handle which could be used with standard sockets was concerned; that about 1925 or 1926 a salesman brought to the factory a drawing of a wrench which was substantially the same as the Eagle wrench; that some work was done in

(Testimony of M. B. Pendleton.)

connection with the type of wrench and finally in 1926 or 1927 the Plomb Tool Company began the manufacture of the Eagle wrench. He testified:

“We then continued our investigation on this problem, and a series of events continued wherein we were able to locate the patentee, Samuel Eagle, after a great deal of difficulty, and then entered into negotiations with him to take out a license, because we felt that inasmuch as we had begun the manufacture of a wrench which seemed to meet a very great demand, and coincided with his wrench, that we should do the right and honorable thing by taking out a license. Meantime, however, we spent several hundred dollars in engineering work.”

He testified that the Plomb Tool Company continued to manufacture the Eagle wrench because it met the requirements of a good tool which involved four tests: inexpensive to manufacture, correct in design, strong and “fool proof”. He further testified:

“Q. Now, in view of all that work that you were actually put to, what is your opinion as a tool manufacturer whether, with the Edmands tool before him, or the Fairchild tool before him, or any other tool shown in the patents, would a mechanic skilled in the art think of making the changes necessary to producing the Eagle patent?”

Mr. GEISLER: I object to the work “think”. If you want to say “could” I have no objection.

Q. What is your opinion, in regard to that, as an expert?

A. My opinion is, it would amount to invention. [90]

A. That it would amount to invention, to take the elements submitted and make an Eagle wrench out of it. Obviously after the Eagle wrench has been constructed it is

DEFENDANT'S EXHIBIT "R"

15



SOY. 8-15-44
MAY 15, 1944, PHOENIX
P. & S. BIRD BROS. CO.
DETROIT, MICH.
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SPECIAL AGENT IN CHARGE

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Testimony of M. B. Pendleton.)

easy enough to look back and say that anybody can do it, because hindsight is always easier than foresight.

Q. What in your opinion is the main advantage of the Eagle wrench over the references cited by the defendant as prior art? Can you say that in a few words, what advantages?

A. The chief advantages are twofold. One is that the Eagle wrench is a one-handed wrench, and second, that the Eagle wrench is designed to be used with the usual standard sockets in possession of the trade.”

By stipulation of counsel Defendant’s Exhibit “R”, a photograph of all of the exhibits introduced by the defendant was received in evidence and made a part of the record of the case.

Respectfully submitted,

CAKE & CAKE,

JUARAGUY & TOOZE,

W. E. RAMSEY,

Solicitors for Plaintiffs.

IT IS HEREBY STIPULATED that the foregoing statement may be approved.

CAKE & CAKE,

JUARAGUY & TOOZE,

W. E. RAMSEY,

Solicitors for Plaintiffs.

T. J. GEISLER,

Solicitor for Defendant.

Approved:

JAMES ALGER FEE,

District Judge.

Dated: January 29, 1934. [91]

[Title of Court and Cause.]

STIPULATION WITH REGARD TO
TRANSCRIPT OF RECORD.

IT IS HEREBY STIPULATED on behalf of the above named parties that the foregoing is a true and complete transcript of record on appeal in this Court and that the Clerk of the United States District Court for the District of Oregon may certify the same as such transcript without comparison thereof with regard to the original record.

Dated Jany. 29, 1933.

W. E. RAMSEY,
of Solicitors for Plaintiff
T. J. GEISLER,
Solicitor for Defendant

[Endorsed]: Filed February 16, 1934. [92]

AND, to wit, on the 11th day of July, 1932, there was duly filed in said Court, the exhibits introduced in evidence at the trial of said cause, the exhibits which the praecipe of appellant directed to be included in the transcript of record being in words and figures as follows, to wit: [93]

PLAINTIFF'S EXHIBIT 1

[Title of Court and Cause.]

STIPULATION.

It is hereby STIPULATED AND AGREED between the plaintiffs, by and through their attorneys, Cake & Cake, and Jaureguy & Tooze and W. Elmer Ramsey, and defendant acting by and through its attorney, T. J. Geisler, as follows:

(1) It is hereby stipulated that the allegations contained in paragraph I of plaintiffs' Bill of Complaint pertaining to the

incorporation and the corporate character of the plaintiff, Plomb Tool Company, a Delaware Corporation, shall stand as admitted by the defendant and the plaintiff shall not be required to prove the said allegations.

(2) It is further stipulated that at the trial of the above cause that the plaintiffs may withdraw the original Letters Patent No. 1380643, involved in this case, and substitute therefor a printed uncertified copy thereof, which will stand in the place and stead of said original letters patent for all purposes whatsoever.

(3) That at the trial of this cause printed, photostatic or lithographed copies of all reference patents, domestic or foreign, furnished by United States Patent Office and pleaded or introduced to illustrate the prior art, or to define the scope of the patent, shall be accepted in evidence without certification, when offered by either party, with the same force and effect as [94] if they had been certified, subject only to proof of inaccuracy, if any, and to their competency and relevancy.

(4) The original assignment of an interest in the patent to the plaintiff, Langs, and the original exclusive license to the plaintiff, Plomb Tool Company, as alleged in paragraphs VI and VII of plaintiffs' complaint, or copies of the records thereof duly certified by the United States Patent Office, shall be sufficient proof of the execution, delivery and contents of said assignment and said license agreement.

Dated this 28th day of June, 1932.

CAKE & CAKE,

JAUREGUY & TOOZE,

W. ELMER RAMSEY,

Attorneys for Plaintiffs.

T. J. GEISLER,

Attorney for Defendant.

[Endorsed]: Filed July 11, 1932. [95]

AND AFTERWARDS, to wit, on the 30th day of January, 1934, there was duly filed in said Court, a Praeceptum for Transcript, in words and figures as follows, to wit: [128]

[Title of Court and Cause.]

STIPULATION WITH REGARD TO
TRANSCRIPT ON APPEAL.

G. H. Marsh, Esquire, Clerk of the above-entitled Court:

IT IS HEREBY STIPULATED on behalf of the above-named parties that the transcript of record will contain the following:

In making up the transcript on appeal now pending in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, please incorporate the following portions of the record:

1. The Bill of Complaint, omitting the verification and the exhibit.
2. The Answer, omitting verification.
3. The condensed Statement of Evidence as approved by the Court.
4. The opinion of the Trial Court.
5. The Decree of the Trial Court, including Findings of Fact.
6. Motion for leave to file Petition for Rehearing.
7. Order granting leave to file Petition for Rehearing.
8. Petition for Rehearing.
9. Order denying Petition.
10. Petition on Appeal.
11. Assignments of Error.
12. Citation on Appeal.
13. Order Allowing Appeal.
14. Undertaking on Appeal.

15. Plaintiffs' Exhibits 1, 2, 7 and 8, which are respectively, a Stipulation, United States Patent No. 1,380,643 granted to Samuel Eagle, Plaintiff herein; the printed advertisement of the Eagle wrench; and United [129] States Patent No. 1,643,814 granted to John N. Peterson.

16. Defendant's Exhibits C, D without the certificate, E, F, G, H, I, J, K, Q and R, which are, respectively, United States Patent No. 348,565 issued to Mandeville; United States Patent No. 820,185 issued to Edmands; United States Patent No. 952,435 issued to Miller; United States Patent No. 1,168,204 issued to Helstrom; United States Patent No. 1,169,987 issued to Miottel; United States Patent No. 1,175,973 issued to Miller and Burg; United States Patent No. 1,209,658 issued to Baltzley; United States Patent No. 1,692,275 issued to Fairchild; United States Patent No. 1,302,197 issued to Miller and Burg; and replicas of pages 18 and 28 of the Plomb Tool Catalogue and which together constitute Exhibit Q, and the composite photographs of various physical exhibits constituting Defendant's Exhibit R.

It is further STIPULATED that an order may be entered by the Court directing that all the original exhibits used in the trial of this cause be sent to said Circuit Court of Appeals for the Ninth Circuit for its use.

Dated January 29th, 1934.

W. E. RAMSEY,
Of Solicitors for Plaintiffs,
T. J. GEISLER,
Solicitor for Defendant.

[Endorsed]: Filed January 30, 1934. [130]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit: [131]

[Title of Court and Cause.]

Plaintiff Eagle, in 1921, obtained a patent upon a wrench which was to be used in conjunction and cooperation with the "usual socket" also described and included in the specifications. The only claim set forth reads:

"A wrench comprising a handle having a bifurcated shank, a socket support having one end mounted and pivotly secured between the branches of the shank bifurcations, and the other end squared, a nut engaging socket having a squared bore adapted to slidably receive the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions."

The defenses are lack of invention and lack of patentable combination. Many prior patents were cited.

By reference to the file wrapper it will be seen that considering the cancellations after rejection by the Patent Office, the single claim remaining must be narrowly construed even if valid. The office rejected a claim consisting of the words "a handle and a pivot pin connecting the handle pivotly to the head," on patents Mandeville (1886) and Miottel (1916), and the claim "a spring pressed catch carried by the shank and riding the rounded end of the head and engageable with an intent provided in the head," on Miottel, in view of Helstrom. Further the office rejected a claim in these words: "A socket open at both ends and adapted to slidably receive the socket support in one end thereof" on Battzley. An interesting feature of these rejections is that the

office considered the socket [132] support of plaintiff's claim with the squared end equivalent to an element in the Mandeville patent consisting of a shank provided with a square nut receiving chamber, and also as equivalent to the element in the Miottel shown as a recessed socket support. In other words the squared male element was held an equivalent of the recessed female element.

Plaintiff Eagle acquiesced in all these rejections and therefore must have conceded the validity thereof. His final contention before the Patent Office was:

“The two claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end pivotally secured to the handle, and the other end adapted to be slidably received in the bore of the nut engaging socket.” With this construction applicant needs no fastening means for holding the socket support and the socket together, depending merely upon the frictional engagement between the parts.

“The references also fail to disclose a socket support or a socket assembled together and held against relative pivotal movement, the socket support being pivotally secured onto the handle and adapted to be held at various positions with respect thereto.”

After all the rejections and cancellations it is doubtful from comparison of the remaining claims with the rejected portions, just what novelty the Patent Office believed the claim covered. Probably the feature of permitting the socket head to be held in different positions is the differentiating factor. At all events it seems perfectly clear that if the office had discovered the Edmands Patent (1906) for a like wrench, the patent in suit would

not have issued. *Hoe Company vs. Goss Press Co.*, 30 Fed. (2d) 271, 274.

The patent of Edmands (1906), which was not cited by the Patent Office, may be read in terms of Eagle, as follows:

“A wrench comprising a handle having a bifurcated shank with a pivot pin between the ends thereof, a head or socket member provided with a nut engaging portion, and a lug projecting from the back of said nut engaging portion, and provided with an eye open to one edge of said lug and adapted to removably engage the pivot pin of said holding member, and means carried by the handle and engageable with the end of the socket support to hold the latter in different positions.”

The Edmands Patent has the same features except that the socket support and the socket itself are in one piece and are adapted to be removed from the pivot pin when the eye is opposite to one edge [133] of the lug.

It is perfectly obvious that when the wrench is being used to remove a nut the functions performed by each member are the same, and the parts are functionally equivalent. The same operation is performed by each in the same way and by the same means. The socket engages and holds the nut for the turning operation, the socket support actuated by the handle turns the socket, the handle is the means by which the twisting force is applied, through the bifurcated shank, and the latter prevents relatively pivotal movement. Likewise the means carried by the handle and engageable with the socket support hold the latter in different positions.

It may be objected that the socket and socket support are mounted together, but that cannot affect the fact that for its useful purpose the functional effect is the same. The relation of the parts to one another is the same functionally in each tool.

On the other hand the methods of attachment if new in the art might themselves constitute invention. It is clear enough that the eye placed upon the lug to make it removable by Edmands, was not essential to holding the socket head in various positions, and could have readily been dispensed with if it had been desired only to perform that function. Furthermore, any mechanic instructed to make the head irremovable would have simply closed that gap and the function for the device for holding the head in various positions would have been as efficient as that upon the Eagle patent. No novelty can be found in this feature.

Considering the squared end for mounting the now standard sockets, it has been noted that the Patent Office holds interchangeable as an old device a squared male and a recessed female member. In the Fairchild Patent (1919) which was not cited, there appears as accessory to a ratchet wrench, a male plug or head slidably mounted in a socket. The same result can be obtained with an adapter, which is a device old in the art and permits a change of female member into a male part. Therefore patentability cannot be claimed for this feature. [134]

“A new and analogous use of an old thing is not invention even though it effects results not before contemplated.”
E. I. Dupont vs. Glidden, 1 Fed. Supp. 1007, 1011. Howe Machine Co. vs. National Needle Co., 134 U. S. 388, 397; St. Germaine vs. Brunswick, 135 U. S. 227, 230.

It has been noted above that Edmands adopted the device of an interchangeable female member on his wrench in 1906. Since that time there have grown up the use of interchangeable standard sockets which are spoken of by the witnesses. Into these devices handles are mounted and held by friction, just as is exemplified in the Eagle patent. Such sockets are known to all mechanics, as is the method of using them with the handles held

only by friction. See *Dennis vs. Great Northern Ry.*, 51 Fed. (2d) 796. Likewise this method is apparently shown in *Fairchild and Baltzley*, the latter of which was referred to by the Patent Office. Just the use of a standard socket and connection therewith by friction alone cannot avail the plaintiff in the attempt to sustain the patent.

Although all the elements of the claim may not be found in one patent, if they are all found in different patents and no new functional relationship is evolved, the patent cannot be sustained. *Dilg vs. Geo. Dorgfeld & Co.*, 189 Fed. 588, 590; *Keene vs. New Idea Spreader Co.*, 231 Fed. 701. This is true whether Eagle actually knew of the other patents or devices, or not.

“While it is entirely true that the fact that this change had not occurred to a mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices. But as before stated in determining the question of invention we must presume the patentee was fully informed of everything which preceded him, whether such were the actual fact or not.” *Mast vs. Stover Mfg. Co.*, 177 U. S. 485, 493.

When one looks at the Edmands Patent and considers the extensive use to which the standard sockets had been placed before plaintiff's patent was applied for, it is inconceivable that anyone, whether mechanical or not, if informed of the need of adapting the patented device to the use of the standard socket, could not have evolved the Eagle patent. [135]

It is insisted that because of the extended use which the device manufactured by the Plomb Tool Company has received, that this court is bound to find invention therein. But where the element of invention is lacking, widespread use will not prevail

to support a patent. *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, 542. "The fact that the patented device has gone into general use, while evidence of its utility is not conclusive of its patentable novelty. * * * A patent must combine utility, novelty and invention. It may embrace utility and novelty in high degree and still be only the result of mechanical skill as distinguished from invention." *Klein vs. City of Seattle*, 77 Fed. 200, 204.

The patent laws are for the purpose of fostering invention, and when that element is found it is right and proper that the fruits thereof be protected. But it would be unfair and unjust to permit one by a clever combination of devices old in the art and which already belong to the public, to monopolize a field and take from the people at large what already belongs to them.

The patent in suit is declared invalid.

[Endorsed]: Filed March 16, 1934. [136]

AND AFTERWARDS, to wit, on Friday, the 16th day of March, 1934, the same being the 11th judicial day of the regular March term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [137]

[Title of Court and Cause.]

ORDER

On stipulation of the parties hereto and their respective solicitors,

IT IS ORDERED that all of the original exhibits used in the

trial of this cause be sent to the Circuit Court of Appeals for the Ninth Circuit for its use.

Dated this 16th day of March, 1934.

JAMES ALGER FEE

[Endorsed]: Filed March 16, 1934. [138]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 138 inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Samuel Eagle, John William Lands, and Plomb Tool Company, a corporation are plaintiffs and appellants, and P. & C. Hand Forged Tool Company, a corporation, is defendant and appellee; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$33.25, and that the same has been paid by said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 17th day of March, 1934.

[Seal]

G. H. MARSH

Clerk [139]

[Endorsed]: No. 7435. United States Circuit Court of Appeals for the Ninth Circuit, Samuel Eagle, John William Langs, and Plomb Tool Company, a Corporation, Appellants, vs. P. & C. Hand Forged Tool Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 23, 1934. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



DEFENDANT'S EXHIBIT L.

[Endorsed]: Filed Jul. 11, 1932. U. S. District Court, G. H. Marsh, Clerk.

[Endorsed]: Filed Mar. 23, 1934. U. S. Circuit Court, Paul P. O'Brien, Clerk.

DEPARTMENT OF COMMERCE

United States Patent Office

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of the office of the File Wrapper and Contents in the matter of the

Letters Patent of
SAMUEL EAGLE,

Number 1,380,643,

Granted June 7, 1921,

for

Improvement in Wrenches.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this tenth day of December, in the year of our Lord one thousand nine hundred and thirty, and of the Independence of the United States of America the one hundred and fifty-fifth.

[Seal]

THOMAS E. ROBERTSON

Attest:

Commissioner of Patents.

D. E. WILSON

Chief of Division.

Number (Series of 1915),

416731

1920

(Ex'r's Book) 19-105

Div. 14

Patent No. 1380643

Division of App., No....., filed....., 19.....

Jun. 7, 1921

Name SAMUEL EAGLE

of Gilbert Plains, Manitoba,

County of

State of Canada.

Invention Wrenches.

Original

Parts of Application Filed.

Petition	Oct. 13, 1920
Affidavit	“ “, 1920
Specification	“ “, 1920
Drawing	“ “, 1920
Photo Copy	, 192
First Fee Cash	\$15, Oct. 13, 1920.
“ “ Cert.	, 192
Appl. filed complete	Oct. 13, 1920

Examined and Passed for Issue Feb. 11, 1921.

N. J. Brumbaugh Exr. Div. 14.

Notice of Allowance February 11, 1921

By Commissioner.

Final Fee Cash #20 May 10, 1921

“ “ Cert. ,192

Renewed

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....., 192
..... Exr. Div.
....., 192
By Commissioner.
....., 192
....., 192
....., 192

Patented Jun. 7, 1921

Attorney Fetherstonhaugh & Co., Victor Bld'g., City

Associate Attorney

(No. of Claims Allowed 1) Print Claim.... in O. G. (Cl. 81-58)

Title as Allowed Wrench

U. S. Patent Off. Oct. 18, 1920, Division 14

\$15 Rec'd Oct. 13, 1920 C. C. U. S. Pat. Office

643

Serial No. 416,731

Paper No. 1

Application

TO THE COMMISSIONER OF PATENTS.

Washington.

Your Petitioner, Samuel Eagle, a subject of the King of Great Britain, and a resident of the Town of Gilbert Plains, in the Province of Manitoba, Canada, whose Post Office address is Gilbert Plains, Manitoba, Canada prays that Letters Patent may be granted to him for certain new and useful Improvements in "WRENCHES" set forth in the annexed specification, and he hereby appoints —~~Fred B. Fetherstonhaugh, practicing under the firm name of~~— Fetherstonhaugh

(Fred B. Fetherstonhaugh and T. Lionel Tansley) Reg. No. 11248 & Co., —~~of the City of Winnipeg, in the Province of Manitoba,~~

Victor Building,

D. C.

~~Canada, and of the City of— Washington, —in the District of Columbia—~~, his attorneys, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the Patent, and to transact all business in the Patent office connected therewith.

SAMUEL EAGLE

Signed at Winnipeg, in the Province of Manitoba, this 23rd day of September, 1920.

In the Presence of:

GERALD ROXBURGH

K. B. WAKEFIELD

[Seal]

Dominion of Canada

Province of Manitoba

City of Winnipeg—ss.

I, Harold S. Tewell, Vice Consul of the United States of America, at Winnipeg, Manitoba, Canada, duly commissioned and qualified, do hereby certify that G. S. ROXBURGH is, to the best of my knowledge and belief, a Notary Public in and for the Province of Manitoba, and that he is duly authorized to administer oaths and take affirmations and acknowledgments; and that, to the best of my knowledge and belief, full faith and credit are due to his official acts as a Notary Public.

Given under my hand and seal of office at Winnipeg, Manitoba, Canada, on this sixth day of October, 1920.

HAROLD S. TEWELL

Vice Consul of the United States of America.

[Consular Service Fee Stamp, in amount of \$2.00, affixed and cancelled.]

TO ALL WHOM IT MAY CONCERN:

Be It Known that I, SAMUEL EAGLE, of the town of Gilbert Plains, in the Province of Manitoba, Canada, have invented certain new and useful Improvements in wrenches of which the following is the specification.

The invention relates to improvements in wrenches and particularly to socket wrenches and the principal object of the invention is to provide a simply constructed and inexpensive and durable wrench, which can be easily and quickly attached to the usual socket and is arranged so that the handle can be brought to a position axially alined with the socket or swung sidewise as occasion demands.

A further object is to arrange the wrench so that the handle can be releasably locked in its axial position.

With the above objects in view the invention consists essentially in the arrangement and construction of parts hereinafter more particularly described and later pointed out in the appended claims, reference being had to the accompanying drawing in which:

Fig. 1 is a perspective view of the complete wrench showing the head situated above the socket.

Fig. 2 is a sectional view through the head end of the wrench and also through the socket.

Fig. 3 is an inverted plan view of the socket.

In the drawing like characters of reference indicate corresponding parts in the several figures.

1 is the handle of the wrench which is suitably shaped for gripping purposes. One end of the handle is decreased in diameter as indicated at 2, and to this end I secure in any suitable

manner a fixed shank 3, which has the forward and bifurcated or forked to receive the upper end of the head 4 which is pivotally fastened to the shank by a cross pin 5 passing through the forks.

The head has the lower end square in horizontal section and the upper end of the head is semi-circular as indicated at 6 and is provided at the top with a depression or indent 7 which is adapted to receive a catch 8 slidably mounted in the shank and normally pressed toward the head by the action of an inserted spring 9.

This latter arrangement is such that when the handle 1 is swung into a position axially alined with the head the projecting end of the catch will enter the indent and have a tendency to lock the parts so positioned. The end of the catch is rounded so that upon pressure being brought on the handle the catch can be sprung out of the indent to release it to swing sidewise.

This tool is especially provided for use with wrench sockets 10 which have their upper ends squared as indicated at 11 to receive the square end of the head and their lower ends shaped to fit a nut. I might here state that this socket varies in practice depending upon the work and may have a hexagonal opening such as shown at 12 or any other sided opening depending on the type of nut on which it is to be used.

A tool of this kind is particularly useful where one has to get under a machine to do the work, such as under an automobile. After having placed the socket on a nut one enters the head 4 in the socket with the handle straight and then by swinging the handle to the side can get considerable leverage to undo the nut.

In using the tool to start a nut the handle is brought to a position such that it is axially alined with the socket and then by turning the handle around by a rolling action between the

hands, the work can be easily accomplished.

What I claim as my invention is:

(1) In a wrench, a head and a handle pivotally secured to the head to allow of swinging movement in a vertical plane.

Sub. A

1 Claim

(2) In a wrench, a head having a squared end, a handle and a pivot pin connecting the handle pivotally to the head.

(3) In a wrench, a head having one end squared, a shank spanning the head and pivotally connected thereto by a pivot pin and a handle secured to the shank.

(4) In a wrench, a head having one end squared and the other end rounded, a shank spanning the rounded end of the head and pivotally connected thereto by a pivot pin, a handle permanently secured to the shank and a spring pressed catch carried by the shank and riding the rounded end of the head and engagable with an indent provided in the head.

Signed at Winnipeg, this 23rd day of September, 1920.

Eagle

SAMUEL EAGLE

In the presence of:

GERALD S. ROXBURGH

K. B. WAKEFIELD

OATH

Dominion of Canada,
Province of Manitoba,
City of Winnipeg.

Samuel Eagle, the above named Petitioner, being sworn, deposes and says that he is a subject of the King of Great Britain, and a resident of the Town of Gilbert Plains in the Province of Manitoba, Canada; that he verily believes himself to be the original, first and sole Inventor of certain new and useful Im-

provements in "WRENCHES" described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used before his invention or discovery thereof, or patented or described in any printed publication in any country before his invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented in any country foreign to the United States on an application filed by him or his legal representatives or assigns more than twelve months prior to this application; and that no application for Patent on said Improvements has been filed by him or his representatives or assigns in any country foreign to the United States, except in Canada, filed the 23rd of June, 1920 under Serial No. 242719.

SAMUEL EAGLE

Sworn to and subscribed before me at Winnipeg, this 23 day of September 1920.

[Seal]

GERALD S. ROXBURGH

A Notary Public, in and for the Province of Manitoba.

Div. 14 Room 323 2-260 L/KR Paper No. 2

Address only "The Commissioner of Patents, Washington, D. C.," and not any official by name.

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

DEPARTMENT OF THE INTERIOR

United States Patent Office

Washington, December 9, 1920.

Fetherstonhaugh & Co.,

Victor Bldg.,

Washington, D. C.

Patent Office

Mailed Dec. 9, 1920

Please find below a communication from the EXAMINER in charge of the application of Samuel Eagle; Serial No. 446,731; Filed October 13, 1920; for WRENCH.

R. F. WHITEHEAD

Commissioner of Patents.

This case has been examined and the following art is cited:

MIOTTEL, 1,169,987, Feb. 1, 1916, (81-177);

MANDEVILLE, 348,565, Sept. 7, 1886, (81-177E);

HELSTROM, 1,168,204, Jan. 11, 1916, (81-58).

Claims 1, 2, and 3 are rejected as failing to patentably distinguish from either Miottel or Mandeville, above cited. The elements *B* of Mandeville and 3 of Miottel are considered the equivalent of applicant's member 4.

Claim 4 is rejected on Miottel in view of Helstrom, above cited. No invention would be involved in placing Helstrom's member 30 in the member 2 of Miottel. The claim is further ob-

jected as because there is no basis in the preceding part of the claim for the "indent" in the next to the last line.

C E 8

N. J. BRUMBAUGH

Examiner, Div. 14.

Serial No. 416,731 Paper No. 3

AMENDMENT A.

U. S. Patent Office, Jan. 8, 1920, Division 14

Application Div. U. S. Patent Office, Jan. 7, 1921

IN THE UNITED STATES PATENT OFFICE

In re application

Samuel Eagle,

WRENCHES.

Filed Oct. 13, 1920,

Serial No. 416,731.

Hon. Commissioner of Patents,

Sir:

In response to the official action of Dec. 9, 1920, please enter the following amendment:

Erase the claims now in the case and substitute:

~~1. A wrench comprising a handle, a socket support pivotally secured thereto and a socket open at both ends and adapted to slidably receive the socket support in one end thereof.~~

2. A wrench comprising a handle having a bifurcated shank, a socket support having one end mounted and pivotally secured between the branches of the shank bifurcations and the other end squared, a nut engaging socket having a squared bore adapted to slidably receive the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions.

[Sig.]

Remarks.

The two new claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end pivotally secured to the handle and the other end adapted to be slidably received in the bore of the nut engaging socket. With this construction applicant needs no fastening means for holding the socket support and the socket together depending merely upon the frictional engagement between the parts. The references also fail to disclose a socket support and socket assembled together and held against relative pivotal movement, the socket support being pivotally secured onto the handle and adapted to be held at various positions with respect thereto.

Respectfully submitted,

SAMUEL EAGLE.

By FETHERSTONHAUGH & CO.

Attorneys.

Washington, D. C.,

Div. 14 Room 323 2-260 L/KR Paper No. 4

Address only "The Commissioner of Patents, Washington, D. C.," and not any official by name.

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

DEPARTMENT OF THE INTERIOR

United States Patent Office

Washington, January 13, 1921.

Fetherstonhaugh & Co.,

Victor Bldg.,

Washington, D. C.

Patent Office

Mailed Jan. 13, 1921

Please find below a communication from the EXAMINER in charge of the application of Samuel Eagle; Serial No. 416,731; Filed October 13, 1920; for WRENCH.

R. F. WHITEHEAD

Commissioner of Patents.

This case, as amended Jan. 7, 1921, has been reexamined, and the following art is cited:

BALTZLEY, 1,209,658, Dec. 26, 1916, (81-58).

Claim 1 is rejected as failing to distinguish patentably from Baltzley. Patentee's member 12 constitutes a pivoted member equivalent to applicant's member 4. Member 10 is a socket open at both ends.

Claim 2 is allowable, as at present advised.

C. E. L.

N. J. BRUMBAUGH

Examiner, Div. 14.

Room 323.

Application Div. U. S. Patent Office, Feb. 7, 1921

U. S. Patent Office, Feb. 8, 1921, Division 14

Serial No. 416,731 Paper No. 5

AMENDMENT B.

IN THE UNITED STATES PATENT OFFICE.

In re application

Samuel Eagle,

WRENCHES

Filed Oct. 13, 1920,

Serial No. 416,731.

Hon. Commissioner of Patents,

Sir:

In response to the official action of Jan. 13, 1921, please enter the following amendment:

Erase claim 1 and the numeral of claim 2.

Remarks.

The rejected claim having been cancelled, this case now appears to be in condition to be passed to issue, and such action is requested.

Respectfully submitted,

SAMUEL EAGLE.

By FETHERSTONHAUGH & CO.

Attorneys.

Washington, D. C.

Div. 14 — KR

2-181

Serial No. 416,731

Address only the Commissioner of Patents,
Washington, D. C.

Department of the Interior
UNITED STATES PATENT OFFICE

Washington, February 11, 1921.

Samuel Eagle,

Sir: Your APPLICATION for a patent for an IMPROVEMENT in WRENCH, filed October 13, 1920, has been examined and ALLOWED.

The final fee, TWENTY DOLLARS, must be paid not later than SIX MONTHS from the date of this present notice of allowance. If the final fee be not paid within that period, the patent on this application will be withheld, unless renewed with an additional fee of \$15, under the provisions of Section 4897, Revised Statutes.

The office delivers patents upon the day of their date, and on which their term begins to run. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will require about four weeks, and such work will not be undertaken until after payment of the necessary fee.

When you send the final fee you will also send, DISTINCTLY AND PLAINLY WRITTEN, the name of the INVENTOR, TITLE OF INVENTION, AND SERIAL NUMBER AS ABOVE GIVEN, DATE OF ALLOWANCE (which is the date of this circular), DATE OF FILING, and, if assigned, the NAME OF THE ASSIGNEES.

If you desire to have the patent issue to ASSIGNEES, an assignment containing a REQUEST to that effect, together with the FEE for recording the same, must be filed in this office on or before the date of payment of final fee.

After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of TEN CENTS EACH. The money should accompany the order. Postage stamps will not be received.

Final fees will NOT be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Respectfully,

M. H. COULSTON

Acting Commissioner of Patents.

Fetherstonhaugh & Co.,

Victor Bldg.,

Washington, D. C.

In remitting the final fee give the serial number at the head of this notice.

Uncertified checks will not be accepted.

\$20 Rec'd May 10, 1921. C. C. U. S. Pat. Office.—J.

MEMORANDUM

Of Fee Paid at United States Patent Office.

(Be careful to give correct Serial No.)

Serial No. 416,731

May 10, 1921

Inventor: SAMUEL EAGLE

Patent to be Issued to See file

Name of Invention, as Allowed: Wrenches

Date of Payment: May 10, 1921

Fee: \$20.00 Final

Date of Filing: Oct. 13, 1920

Date of Circular of Allowance: Feb. 11, 1921

The Commissioner of Patents will please apply the accompanying fee as indicated above.

FETHERSTONHAUGH & CO.

Attorney.

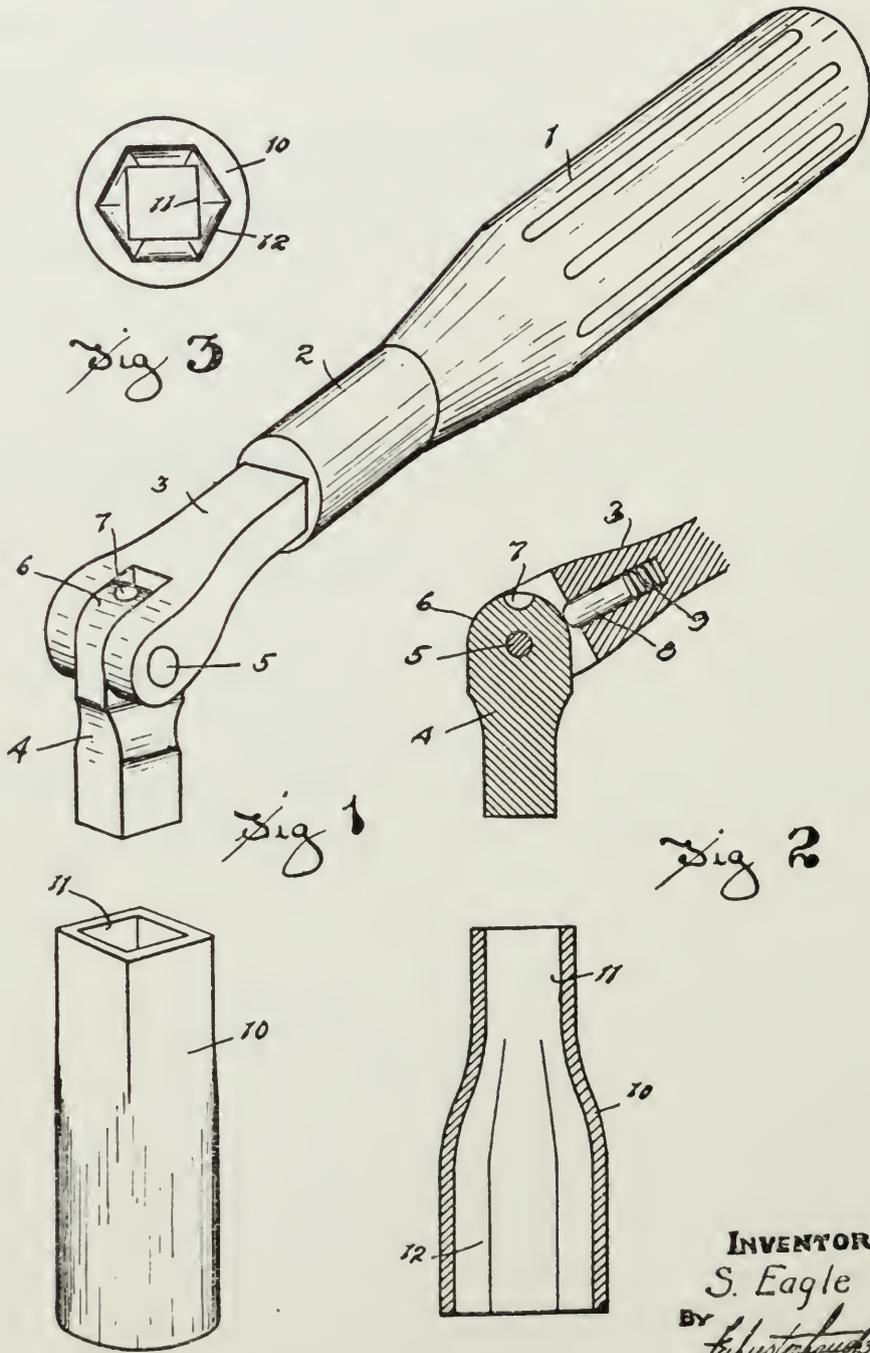
Send Patent to Attorneys

S. EAGLE.
WRENCH.

APPLICATION FILED OCT. 13, 1920.

1,380,643.

Patented June 7, 1921.



INVENTOR
 S. Eagle
 BY *Robert [Signature]*
 ATTYS

UNITED STATES PATENT OFFICE.

Samuel Eagle, of Gilbert Plains, Manitoba, Canada.
Wrench.

1,380,643.

Specification of Letters Patent.

Patented June 7, 1921.

Application filed October 13, 1920. Serial No. 416,731.

To all whom it may concern:

Be it known that I, SAMUEL EAGLE, of the town of Gilbert Plains, in the Province of Manitoba, Canada, have invented certain
5 new and useful Improvements in Wrenches, of which the following is the specification.

The invention relates to improvements in wrenches and particularly to socket wrenches and the principal object of the invention is
10 to provide a simply constructed and inexpensive and durable wrench which can be easily and quickly attached to the usual socket and is arranged so that the handle can be brought to a position axially alined
15 with the socket or swung sidewise as occasion demands.

A further object is to arrange the wrench so that the handle can be releasably locked in its axial position.

20 With the above objects in view the invention consists essentially in the arrangement and construction of parts hereinafter more particularly described and later pointed out in the appended claim, reference being had to the accompanying drawing in which:—

25 Figure 1 is a perspective view of the complete wrench showing the head situated above the socket.

Fig. 2 is a sectional view through the head end of the wrench and also through
30 the socket.

Fig. 3 is an inverted plan view of the socket.

In the drawing like characters of reference indicate corresponding parts in the several figures.

1 is the handle of the wrench which is suitably shaped for gripping purposes. One end of the handle is decreased in diameter as indicated at 2, and to this end I secure in
40 any suitable manner a fixed shank 3, which has the forward end bifurcated or forked to receive the upper end of the head 4 which is pivotally fastened to the shank by a cross pin 5 passing through the forks.

45 The head has the lower end square in horizontal section and the upper end of the head is semi-circular as indicated at 6 and is provided at the top with a depression or indent 7 which is adapted to receive a catch 8 slid-
50 ably mounted in the shank and normally pressed toward the head by the action of an inserted spring 9.

This latter arrangement is such that when the handle 1 is swung into a position axially aligned with the head the projecting end of 55 the catch will enter the indent and have a

tendency to lock the parts so positioned. The end of the catch is rounded so that upon pressure being brought on the handle the catch can be sprung out of the indent to 60 release it to swing sidewise.

This tool is especially provided for use with wrench sockets 10 which have their upper ends squared as indicated at 11 to receive the square end of the head and their lower 65 ends shaped to fit a nut. I might here state that this socket varies in practice depending upon the work and may have a hexagonal opening such as shown at 12 or any other sided opening depending on the type of nut 70 on which it is to be used.

A tool of this kind is particularly useful where one has to get under a machine to do the work, such as under an automobile. After having placed the socket on a nut one 75 enters the head 4 in the socket with the handle straight and then by swinging the handle to the side can get considerable leverage to undo the nut.

In using the tool to start a nut the handle 80 is brought to a position such that it is axially alined with the socket and then by turning the handle around by a rolling action between the hands, the work can be easily accomplished. 85

What I claim as my invention is:—

A wrench comprising a handle having a bifurcated shank, a socket support having

one end mounted and pivotally secured between the branches of the shank bifurcations and the other end squared, a nut engaging socket having a squared bore adapted to slidably receive the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions. 90 95

Signed at Winnipeg, this 23rd day of September, 1920.

SAMUEL EAGLE.

In the presence of—

GERALD S. ROXBURGH,
K. B. WAKEFIELD.

1920

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United States
Circuit Court of Appeals

For the Ninth Circuit 12

SAMUEL EAGLE, JOHN WILLIAM LANGS,
and PLOMB TOOL COMPANY, a corporation,
Appellants,

vs.

P. & C. HAND FORGED TOOL COMPANY,
a corporation,
Appellee.

Appellants' Brief

Upon Appeal from the United States District Court
for the District of Oregon

CAKE & CAKE
JAUREGUY & TOOZE, and
W. ELMER RAMSEY
Solicitors for Appellants

T. J. GEISLER
Solicitor for Appellee

FILED

JUL 13 1934

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals

For the Ninth Circuit

SAMUEL EAGLE, JOHN WILLIAM LANGS,
and PLOMB TOOL COMPANY, a corporation,

Appellants,

vs.

P. & C. HAND FORGED TOOL COMPANY,
a corporation,

Appellee.

Appellants' Brief

Appeal from the United States District Court for the
District of Oregon.

HONORABLE JAMES ALGER FEE, District Judge

THE ISSUES

Statement of the Case

This is an appeal from a decree adjudging invalid and void for lack of invention the single claim of the patent granted to Samuel Eagle, patented June 7, 1921, No. 1,380,643, for an improvement in wrenches.

The respective plaintiff-appellants are the inventor, Samuel Eagle, an assignee of an interest John William Langs, and Plomb Tool Company, a corporation, licensee under said patent.

By stipulation entered into between the parties, Plaintiffs' Exhibit 1 (T. 156-7), the corporate status of the Plaintiff Plomb Tool Company stands admitted instead of denied, and the interests of the various parties are evidenced by the exhibition of the patent and instruments of conveyance thereof.

The Appellee P & C Hand Forged Tool Company, a corporation, admits due and legal notice of infringement of said Eagle patent. Evidence was admitted proving the receipt of a circular, Plaintiffs' Exhibit 7, (T. 125) in 1922, **some three years before Appellee commenced the actual manufacture of their infringing wrenches** and of letters addressed to Appellee by Appellants' attorney, which letters it acknowledged (T. 150-1).

Infringement of the single patent claim is conceded by Appellee, said confession being summarized in Appellee's brief filed in the United States District Court for the District of Oregon as follows:

"The issue in this case is simple. The wrenches manufactured and sold by the Defendant—referring to both Defendant's Interrogatory Exhibits A and A' and B and B'—are in substance the same as the Eagle patent. There is thus only one question involved; name-

ly, does the structure defined in said claim involve invention?"

The Patented Wrench

The Eagle wrench has been termed in the trade a flex-handle or hinge-handle wrench and comprises a handle to one end of which is secured a short socket support having its free end squared. Said socket support is pivotally mounted upon a pin permitting the socket support angular movement in a single plane. Slidably secured to the squared end of said socket support is a standard socket. A spring pressed pin bears against the pivoted end of the socket support to hold the latter in different positions. A standard socket is a hollow shell having a non-circular bore, one end of said bore being squared to fit said socket support and the other formed to fit a nut to be turned by said wrench (T. 103). This structure is clearly shown in the drawings which form a part of the Eagle patent. Plaintiffs' Exhibit 2, (T. 33-36). The purpose of said wrench and its function are set out in the introduction of said patent, lines 7 to 19 inclusive, as follows:

"The invention relates to improvements in wrenches and particularly to socket wrenches and the principal object of the invention is to provide a simply constructed and inexpensive and durable wrench which can be easily and quickly attached to the usual socket

and is arranged so that the handle can be brought to a position axially alined with the socket or swung sidewise as occasion demands.

A further object is to arrange the wrench so that the handle can be releasably locked in its axial position."

The manner in which said wrench is used is diagrammatically shown in Plaintiffs' Exhibit 7 (T. 125), and its features are described in said exhibit as follows:

"This wrench has all the advantages of a ratchet combined with a simplicity all its own. It can be used in the most awkward places; it fits and reaches any and all nuts and bolt heads. When working at a bolt or nut which permits only half a turn, the hinged handle of the wrench can be brought through the half turn, then swung over to the original position and the full circle completed. When it is impossible to get a half turn, the handle stands straight away from the end of the socket and is turned by means of a punch through the holes provided, doing away with the annoyance always encountered in a job of this sort."

Prior Art

Appellee has cited as examples of the prior art all of the patents cited by the Patent Office in considering the application for patent which

matured into the Eagle patent. These references are as follows:

United States Patent No. 348,565, issued to I. J. Mandeville, dated Sept. 7, 1886, entitled Combination Tool, identified as Defendant's Exhibit "C" (T. 49);

United States Patent No. 1,168,204, issued to J. Helstrom, dated Jan. 11, 1916, entitled Wrench, identified as Defendant's Exhibit "F" (T. 65);

United States Patent No. 1,169,987, issued to E. R. Miottel, dated Feb. 1, 1916, entitled Socket Wrench, identified as Defendant's Exhibit "G" (T. 71);

United States Patent No. 1,209,658, issued to O. F. Baltzley, dated Dec. 26, 1916, entitled Tool, identified as Defendant's Exhibit "I" (T. 79);

In addition, Appellee cites and relies upon the following patents:

United States Patent No. 820,185, issued to John W. Edmands, dated May 8, 1906, entitled Tool, identified as Defendant's Exhibit "D" (T. 53);

United States Patent No. 1,292,285, issued to Mortimer J. Fairchild, dated Jan. 21, 1919, entitled Socket Wrench, identified as Defendant's Exhibit "J" (T. 85);

United States Patent No. 952,435, issued to C. Miller, dated Mar. 15, 1910, entitled Socket Wrench, identified as Defendant's Exhibit "E" (T. 59);

United States Patent No. 1,175,973, issued to M. Miller and A. D. Burg, dated Mar. 21, 1916, entitled Wrench, identified as Defendant's Exhibit "H" (T. 75);

United States Patent No. 1,302,197, issued to M. Miller and A. D. Burg, dated April 29, 1919, entitled Wrench, identified as Defendant's Exhibit "K" (T. 91).

Although all these patents are relied upon by the Appellee as examples of the prior art, principal reliance is had upon the Edmands patent. Appellee, Defendant below, contends in its brief filed in the District Court that the wrenches manufactured by Appellants and by Appellee, which are in substance the same as the Eagle patent, "are also in substance the same as the prior patent to Edmands".

The Claim to be Construed

As has been pointed out, there is but one claim in the Eagle patent which is set out immediately below and the portions of said claim which are not readable upon Edmands are **printed in boldface type**, for the Court's convenience.

"A wrench comprising a handle having a bifurcated shank, a socket support having one end mounted **and pivotally secured** between the branches of the shank bifurcations **and the other end squared**, a nut engaging socket **having a squared bore adapted to slidably receive**

the squared end of the socket support therein, and means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions.”

Reference is had to the drawings in the Edmands patent (T. 54). Said drawing discloses that the Edmands' wrench comprises a handle which is in one piece, and a socket head including a socket, and a socket support which latter two elements are integral. The socket head is pivotally mounted at the end of the handle but is not **secured** thereto. That is, said socket head is adapted to be **detached** therefrom. Edmands has provided slotted ears which when arranged in alinement with a flattened surface of the pivot pin, permit the socket head comprising the integral socket and socket support to be disengaged. Thus, the handle in Edmands is adapted to receive and operate with a plurality of integral sockets and socket supports, which can be detached from the handle. In the Eagle patent, a similar range of adaptability for nut sizes is accomplished by **slidably** disengaging said sockets from the socket support and substituting sockets of different sizes. Thus in the Eagle wrench a wide range of sizes is provided by the **slidable** engagement of one of a series of sockets **with the socket support**, while in Edmands a similar range of sizes is secured by disengaging the entire socket head, comprising a socket with its integral support, at the pivot connection with the handle and substituting another socket head. This

difference has resulted in the Edmands wrench being substantially unknown in the art (T. 138), while even Appellee's counsel admitted outstanding success for the Eagle wrench (T. 143).

Eagle Wrench Has Enjoyed Unusual Commercial Success

M. B. Pendleton, general manager of Appellant Plomb Tool Company, testified that his Company has manufactured and sold between thirty-three and thirty-four thousand wrenches embodying the features of the Eagle patent (T. 38). "That would be half of the wrench handle business offered to the automobile mechanic trade" by his Company. This witness further testified (T. 40):

"* * * we are manufacturing more wrenches of the Eagle type than we are all of the other handles put together, and the acceptance of the Eagle type wrench by our trade has rendered obsolete a great quantity of the solid type wrenches * * *."

He was then asked whether their experience as a manufacturer is the experience of other manufacturers competing with them, and he testified that their experience was common throughout the trade. He then testified (T. 40-41) as follows:

"There are approximately sixteen other manufacturers competitive to the Plomb Tool Company making wrenches of both Eagle and other types, and this witness estimated that

the annual manufactured volume of Eagle type wrenches would run somewhere in the neighborhood of 125,000 wrenches per year and that if the experience of other manufacturers is anything like the experience of Plomb Tool Company, that would be half of the wrench handle business offered to the automobile mechanic trade. This witness then explained why the Eagle type wrench has displaced the other type of wrenches as follows:

“A. The reason that the Eagle type of wrench has displaced the various types of solid handled wrenches, is because a mechanic with one Eagle type handle can perform most if not practically all of the jobs and operations which the other solid type handles perform, and obviously a mechanic will gladly buy one handle having a wide and varied use, rather than buy a collection of other type handles which involve expense and inconvenience and duplication.”

Mr. C. F. Carlborg, who has been a machinist since 1900 and an automobile mechanic since 1905 and formerly a partner with Mr. Peterson (now president of Appellee P. & C. Hand Forged Tool Company), which partnership was absorbed by the P. & C. Hand Forged Tool Company, and whose duties in Appellee corporation and previously in said partnership were to handle the shop end of the business and to aid in the design of tools,

testified (T. 124) that he was familiar with the Eagle patent and with the Eagle wrench and that this type of wrench is generally called a flex-handle or hinge handle wrench. This witness testified (T. 138):

“* * * that the defendant company manufactured as many flex-handle wrenches as all other types of handles combined, and that the experience of the defendant company was the same as the experience of the Plomb Tool Company, as testified to by Mr. Pendleton.”

This witness testified (T. 138) that in his experience as a mechanic from 1900 to the date of trial he had never seen a wrench of the type shown in the Edmands patent, nor of the type shown in the Fairchild patent.

J. J. Buhler, called as a witness by Plaintiffs, testified that he was the sales representative of the Plaintiff Plomb Tool Company in Oregon, Washington and Northern Idaho, and that he had been a salesman since 1929, handling sales in California previous to selling in the territory first mentioned, and that prior to becoming a salesman he had been an automobile and truck mechanic for approximately seven years repairing and overhauling tractors, trucks and making general repairs; that he handled the general line of Plomb tools, which included (T. 143) handles, wrenches, standard sockets, ratchets, punches, chisels, etc., and that he sold them to jobbers and mechanics;

that he did not stress any particular kind of tool, but that "the tool game is mostly sockets and handles". The witness testified that he did not carry any of the old style wrenches, such as T-wrenches, speed wrenches, etc., but that occasionally he sold a T-handled wrench when it was ordered "out of the catalogue". The witness testified as compared with the ratchet wrench, T-handles and L-handles adapted to the ordinary socket set, the sales of the flex-handle were equal to the sales of the other handles combined.

Appellee Is a Deliberate, Not An Inadvertent, Infringer of Appellants' Patent

It is not contended by Appellee that P. & C. Hand Forged Tool Company developed its infringing wrench unwittingly and without knowledge of the Eagle patent. The uncontradicted testimony of C. F. Carlborg, formerly vice-president and in charge of the shop of Appellee's business (T. 124), was that some three years prior to the time when Appellee started manufacturing the flex-handle wrench (T. 127) a friend from Salt Lake handed him a pamphlet describing the Eagle flex-handle wrench and socket and that said pamphlet was substantially the same as Plaintiffs' Exhibit "7" (T. 125); that they made up a sample of the same general type of flex-handle wrench and in 1925, which was three years later, they made a flex-handle wrench with a straight handle and a forked, bifurcated socket-holder device with a pin through

it to make a hinge (T. 128) which was the start of Appellee's hinge-handle wrench business.

Samuel Eagle, the inventor, testified (T. 37) that the tool trade was acquainted with his invention by his manufacture and sale of 1,000 wrenches in 1920, and a few in 1921, and that said wrenches were scattered over as wide a sales area as he could to advertise the same.

Mr. M. B. Pendleton, the general manager of Appellant Plomb Tool Company, testified how said Company was advised of the Eagle wrench, stating (T. 151-2) that about 1925 or 1926 a salesman brought to the factory a drawing of a wrench which was substantially the same as the Eagle wrench; that some work was done in connection with the type of wrench and finally in 1926 or 1927 the Plomb Tool Company began the manufacture of the Eagle wrench. He testified:

“We then continued our investigation on this problem, and a series of events continued wherein we were able to locate the patentee, Samuel Eagle, after a great deal of difficulty, and then entered into negotiations with him to take out a license, because we felt that inasmuch as we had begun the manufacture of a wrench which seemed to meet a very great demand, and coincided with his wrench, that we should do the right and honorable thing by taking out a license. Meantime, however, we spent several hundred dollars in engineering work.”

It is not Appellee's contention that its infringing wrench WAS developed from the Edmands' wrench, but only that said development MIGHT be made by a skilled mechanic.

The theory that with the Edmands wrench before him and a knowledge of all of the prior art, a mechanic skilled in the tool art **might** conceive and construct the Eagle wrench without exercising the faculty of invention is not based upon actual experience of any of the witnesses but merely upon the opinion of several of Appellee's witnesses that under said circumstances a skilled mechanic would be able to so conceive and construct a flex-handle wrench of this character. To support the theory that the improvement made by Samuel Eagle and defined by his patent claim was a mere mechanical choice and did not involve invention, Appellee called W. E. Kelly, an architect of Milwaukie, Oregon, whose experience with mechanics consisted of a course in steam engineering which he took when he was quite young and in connection with the making of patent drawings and the taking out of a few patents of his own (T. 95). This witness' experience with tools was gained in connection with the work of Appellee and he had no practical experience except using a wrench of the character of the Eagle wrench on his own car. He had never worked at the trade of an automobile mechanic (T. 103). This witness on direct examination testified (T. 97):

“Q. Would there be any mechanical advantage in making these two parts, which are now in one, in two parts; I mean in making the lug and the socket in two separate pieces instead of in one piece? Would there be any mechanical advantage in that?”

“A. I don’t see any advantage at all; this does anything the other will do.”

Further on direct examination, this witness was interrogated on this point as follows (T. 100):

“Q. With the Fairchild patent before you, and with the Edmands patent before you, state whether or not you would consider it difficult for a mechanic to provide means in a wrench for holding the movable socket support in different positions, I mean a spring friction pin, or its equivalent?”

“A. There is no provision made to hold the Fairchild, where there is in the Edmands. The support in the Edmands is very similar to the —.

“Q. Now if I asked you to design a wrench which had socket holding piece, and to provide means for holding that in different positions, angular positions, with the knowledge of these two patents before you, would you find any difficulty in making such a wrench?”

“A. No.”

On cross examination, this witness testified

(104) that all of the parts in the Edmands wrench are old devices of themselves except for their specific form, and qualified his statement that the Edmands wrench would do everything the Eagle wrench would by stating that the Edmands wrench would not accommodate a standard socket without an adapter (T. 105). This witness had previously stated that the Eagle wrench would quickly wear out. On cross-examination he admitted that his previous statement was merely an estimate or guess (T. 105) and that he had had no actual experience with these matters. He further testified that he had never seen the Edmands wrench or the Fairchild wrench in use in any place (T. 106). The Edmands wrench in use further would in one position have its head arranged so that it would fall off and that it was necessary when using said wrench to arrange said head in this position. This witness further testified that if the slot by which said socket head is removed would be closed, it would destroy its utility as a handle with a removable head (T. 107).

Appellee then called R. N. Shinn, a machinist who has had twenty-eight years' training including apprenticeship and some additional supplemental training and testified (T. 108) that he did not think there was any advantage in the Eagle wrench over the Edmands patent. He further testified (T. 108):

“Q. Now just look at the Fairchild patent, defendant's exhibit J, and the model of the

same, defendant's exhibit M. Now with the Fairchild patent before you and the Edmands patent before you, would you find, as a mechanic, any difficulty in providing in a wrench a socket support, a male socket support or square head, as they call it, as a means for holding that socket support in different angular positions with respect to the nut?

"A. No trouble whatsoever.

"Q. What would you think of a mechanic who found difficulty in making such a wrench?

"A. I wouldn't call him a mechanic.

"Q. State whether or not you find any advantage in the Edmands construction over the Eagle construction?

"A. Edmands over the Eagle; I don't see there would be any great advantage, only the cost of manufacture of the Edmands might be a little cheaper."

This witness further testified (T. 111-112) that he had used a wrench pretty much like the Edmands' wrench some years before and bebuilt it, but that this was a long time ago and the details were not clear in his mind (T.116), and that said tool had probably been forgotten by this time except in his own mind (T. 117).

Further, on cross examination he was questioned closely with regard to the cost of producing the Eagle wrenches and the Edmands type wrench,

which latter wrench he had previously testified was cheaper to manufacture. This witness explained that the socket head for Edmands would be drop forged (T. 113) while the little square socket support in the Eagle patent might be "milled out or could be drop forged too". He testified that he never kept any cost accounts of tools and therefore could not give relative costs (T. 114), but believed that it would be easier to tool up for the Edmands socket head. He could not give any testimony as to the cost of tooling up, the time necessary for said manufacturing process, or the expense without quite a little bit of thinking of that and study. He then retracted his statement that tooling up and making dies for drop forging would be cheaper than setting up the head for the Eagle machine in the milling machine and then states positively that it would cost more to tool up for drop forging (T. 115) and that the Edmands would cost most, but that he believed that the cost of the Edmands socket head would be less than the cost of the socket and the head in the Eagle wrench, although he did not know the cost of sockets (T. 116). He further testified that he did not buy sockets; that he had never bought any wrenches of the type of the Eagle wrench or of the type exemplified by Defendant's Exhibit "BB"; that he had not used tools for six or seven years.

Eagle Wrench Is True Invention

Opposed to said theories and faintly remem-

bered incidents is the statement of Appellants' witness M. B. Pendleton that the problem of providing a wrench which would produce the new results desired and which was eventually solved by the Eagle wrench occupied the attention of many inventors and his own company as well; that during the period 1922 to 1929 it was his duty on behalf of the Plomb Tool Company to interview all inventors who came to the factory with ideas for the improvement of mechanics' tools; that during that period there was a repeated demand for some improvement in handles which could be used with the standard socket then in possession of garage mechanics; that during that period the Plomb Tool Company spent "a good many hundred dollars" attempting to devise some sort of a jointed wrench which would meet the apparent demand. He said that his connection with the Plomb Tool Company began in 1918 and although it was not his responsibility until 1922 to interview inventors, he nevertheless saw them at the factory and examined various devices for the improvement of mechanics' tools; that his experience prior to 1922 was the same as it was subsequent to that date so far as the demand for a handle which could be used with standard sockets was concerned (T. 151).

He summarized his opinion with regard to this matter and testified (T. 152) that the Plomb Tool Company adopted and continued to manufacture the Eagle wrench because it met the requirements of a good tool which involved four tests, namely:

Inexpensive to manufacture, correct in design, strong, and "fool proof". He further testified:

"Q. Now, in view of all that work that you were actually put to, what is your opinion as a tool manufacturer whether, with the Edmands tool before him, or the Fairchild tool before him, or any other tool shown in the patents, would a mechanic skilled in the art think of making the changes necessary to producing the Eagle patent?"

* * * * *

"A. My opinion is, it would amount to invention.

"A. That it would amount to invention, to take the elements submitted and make an Eagle wrench out of it. Obviously after the Eagle wrench has been constructed it is easy enough to look back and say that anybody can do it, because hindsight is always easier than foresight."

Appellant's witness Buhler testified on cross-examination as follows (T. 150):

"Q. Now taking the Edmands wrench, and taking that piece off there, that socket piece, and putting a hinge lug there, a male part, will that involve any difficulty to an ordinary mechanic?"

"A. How do you mean put an ordinary lug?"

"Q. Just take that piece off and replace that,

and hinge permanently in place a male socket holder, could an ordinary mechanic do that if you asked him to?

“A. No.”

Appellant's witness Carlborg testified that he helped Mr. Peterson of the Appellee Company design tools (T. 124) and that after viewing the circular (Pl. Exh. 7—T. 125) describing Appellants' wrench and after losing the picture (T. 127) he did not reproduce said Eagle wrench but designed a wrench having a handle and a socket support lying alongside of each other rather than one forked over the other and it was several years later that they correctly reproduced the Eagle wrench (T. 128); that Mr. Peterson of the Appellee company then devised a new wrench which he considered an improvement upon the Eagle wrench and obtained a patent on said change predicating a claim of invention on said parts as modified (Pl. Exh. “8”—T. 129-134). This witness testified, however, that the Peterson patented wrench cost more to manufacture as it took slightly more material than the wrench made on the Eagle pattern and would not operate in as small a space as would the Eagle wrench (T. 135). This witness also refuted the testimony of Appellee's expert witness Mr. Shinn with regard to the cost of producing the Edmands wrench as compared to the Eagle wrench. This witness handled the shop end of Appellee's business (T. 124) and he testified that

the Edmands wrench would cost at least twice as much as the Eagle wrench (T. 136). He explained the operations required to make the Edmands wrench and compared them with the operations required to make the Eagle socket support and a standard socket and summarized by saying that it required at least five more operations to make the Edmands wrench than to make a standard socket (T. 134). He testified that the socket support of the Eagle wrench "is very inexpensive, requiring just a short piece of square steel, that is made semi-circular on one end, and a hole driven for the ball." Previous to the introduction of the Eagle wrench, this witness testified that (T. 137) there were many places on the motors and chassis of the car that required a wrench of special design because there were places that were hard to get at. He further testified (T. 138) that mechanics generally spent lots of time on designing wrenches that would eliminate this vast number of wrenches and that he personally spent some time on this problem himself. This witness also refuted the testimony of Appellee's expert witness Kelly with regard to wear of the Eagle wrenches and testified (T. 142) that breakage was a rare occurrence and that he had been using wrenches of this character for the last three years, not every day but a good deal of the time, and they are still as good as ever and that none of said wrenches would wear out in a year's time.

The Tools Which the Eagle Wrench Replaced

Mr. M. B. Pendleton, general manager of plaintiff Plomb Tool Company, testified (T. 39):

“A. Yes. In the early days of my manufacturing experience we customarily manufactured for the garage trade, garage mechanics’ use, various types of solid handled wrenches, such as the L-wrench, the T-wrench, the solid speed handled wrench, and wrenches having various bends and shapes to get around natural obstructions in the repairing of an automobile.

“Q. Prior to your starting manufacture of the Eagle wrench, these wrenches took care of all the needs of the automobile mechanic, is that true?

“A. Yes; those were the wrenches that were necessary to perform the work that an automobile mechanic was required to do, and we made a very large number of these wrenches in various shapes and sizes; obviously every handle had its own socket as a part thereof, and there were a great many of the solid handled wrenches required to perform the work.

“Q. You say each handle had its own socket?

“A. As manufactured by us, they were all one-piece tools, with whatever shaped handle the case required, and with this opening at-

tached thereto, to the solid piece.

“Q. Did you or did you not manufacture handles which were adapted to be used with sockets?

“A. Yes, we also manufactured handles to be used with sockets, and which were separate yet the handles themselves had to follow the same general shape as did the original solid wrenches with handle and socket all in one.

“Q. When you speak of a T-wrench and an L-wrench, you speak of the shape of the handle as they resemble a capital letter ‘L’ or a capital letter ‘T’?

“A. Yes.”

C. F. Carlborg, a witness for Appellants testified (T. 137):

That he was familiar with the use of wrenches of the character of Edmands and Eagle wrenches; that his first experience with wrenches was as an automobile mechanic; that at said time automobile mechanics had sockets which consisted of a handle with right and left hand ratchets and a number of sockets made out of pressed steel; that garage mechanics at that time had T-handle wrenches made by blacksmiths; that the average mechanic from about 1915 to 1920 and later possessed as high as 150 pounds of wrenches, aggregating about 100 wrenches; that it was necessary to have this number of wrenches in order to do the work in dif-

ferent places on motors and the chassis of automobiles. Mr. Carlborg testified that one wrench would not suffice because there were nuts and bolts of different sizes and that certain operations required wrenches of special design. Respecting this latter matter, he said (T. 80):

“A. There were places on the motors and chassis of the car that required a wrench of a special design, because there were places that were hard to get at.”

The witness testified that since the introduction of flex-handle wrenches the average automobile mechanic is not required to possess as many wrenches as formerly because the flex-handle wrench, with a set of sockets is capable of being used on most of the work done on a motor; that about three flex-handles of different sizes and about 26 sockets were sufficient for the average mechanic at the present time. He stated that prior to the introduction of the flex-handle wrench the average mechanic was required to purchase from \$200 to \$250 worth of wrenches.

J. J. Buhler, salesman for plaintiff Plomb Tool Company, testified (T. 143) that when he worked for the General Petroleum Company as a mechanic, from 1922 to 1929, there was in use solid wrenches of various kinds, standard sockets for which handles were specially made in order to make them usable in difficult places. Buhler testified that during the period he was employed by the Gen-

eral Petroleum Corporation a good mechanic who took pride in his work would have possibly 200 wrenches whereas an indifferent mechanic would have 25 and borrow other needed tools from other employees. He testified that the first flex-handle wrench he saw was in 1928 and that following the introduction of this wrench practically every employee in the shop at the General Petroleum Corporation bought from one to three of these wrenches. He testified further:

“Q. Did they, or didn’t they, discard their old wrenches?”

A. Yes, pretty much so.”

He said that there were approximately 30 mechanics regularly employed and that they all adopted the flex-handle wrench.

This witness further testified (T. 146) that the average mechanic prior to the introduction of the flex-handle wrench had an investment of from \$250 to \$300 in tools. He testified that in some shops, in Ford shops particularly, mechanics now are instructed to discard obsolete handles and to confine their tools to sockets and flex-handles.

The New Result Attained By the Eagle Wrench

As has been pointed out, the Edmands’ wrench differs from the Eagle wrench in that the Edmands’ wrench is provided with an open slot which, when it becomes in registration with a flat portion of the pivot pin in the handle of the wrench,

permits the socket head to slide laterally from the handle and to drop off. This is not so in the Eagle wrench because the socket support is secured to the handle and cannot be removed without driving out the rivet which secures said socket support in place and which constitutes the pivot pin (T. 139). The alinement of said parts occurs at one operative position of the Edmands' wrench as was admitted on cross examination of Appellee's witness Kelly (T. 106) and when this occurred the wrench would not constitute a flex-handle wrench because it would lock or drop off in this position, as was testified by Appellant's witness Buhler (T. 150). This witness also testified with regard to the Edmands' wrench (T. 147):

“A. Exhibit ‘AA’ when that hinge is down, is more or less, seems sloppy, that is, a lot of lost motion; I don’t believe if you are holding something in one hand, and try to hinge it down to advantage, you could do that; you might have to take two hands; it seems to kind of catch in the slides out a little ways. In other words it don’t come back all the way here, like this; you can’t hardly move it, it locks that way.”

Appellants' witness Buhler testified that the Eagle wrench had two advantages: (1) that it was a one-handed wrench and (2) that it was adapted to use standard sockets (T. 148). He testified that the Edmands' device was not adapted to use stand-

ard sockets because there is no place to put standard sockets and that a mechanic understood what a standard or usual socket was, it being a socket with a non-circular hole extending through it, one end fitting the nut and the other fitting the socket support (T. 149). He further testified that the Edmands' wrench could not be used with one hand (T. 149):

“You would have a hard time using it with one hand, to get any speed or anything out of it; also he would be afraid it would drop off in using it in this position on a manifold, unless you happened if you were working in the dark, or unless you were watching real close, you would be picking this thing on and off all the time; it would be bothering.”

Appellants' witness Pendleton summarized the new results attained by the Eagle wrench as follows (T. 42):

“A. The special features of the Eagle wrench comprise the simplest, most inexpensive to manufacture, least trouble type of flex-handled wrench that has yet been conceived, and it makes possible the use of the handle in connection with sockets common to the automobile industry.”

This witness again summarized the advantages and the new results attained by the Eagle wrench (T. 155) as follows:

Q. What in your opinion is the main advantage of the Eagle wrench over the references cited by the defendant as prior art? Can you say that in a few words, what advantages?

“A. The chief advantages are two-fold. One is that the Eagle wrench is a one-handed wrench, and second, that the Eagle is designed to be used with the usual standard sockets in possession of the trade.”

Opinion of Trial Court

Judge Fee, in his opinion said:

“Since that time there have grown up the use of interchangeable standard sockets which are spoken of by the witnesses. Into these devices handles are mounted and held by friction, just as is exemplified in the Eagle patent.

* * * * *

“When one looks at the Edmands’ patent and considers the extensive use to which the standard sockets had been placed before plaintiff’s patent was applied for, it is inconceivable that anyone, whether mechanical or not, if informed of the need of adapting the patented device to the use of the standard socket, could not have evolved the Eagle patent. (135).”

GROUND FOR REHEARING

The plaintiffs below respectfully petitioned for a rehearing for the following reasons:

(1) That the Court erred in holding and deciding that the single claim contained in the United States Patent No. 1,380,643, granted June 7, 1921, to Samuel Eagle, which is the patent litigated herein, must be held invalid upon the references cited and upon the examples of the purported prior art submitted by the defendant.

(2) That the Court erred in holding and deciding that the fact that several of the elements set out in said claim are old and that several sub-combinations of said element are old, and therefore the single claim of said patent must be construed to have very narrow scope, or to be construed to be of doubtful validity.

(3) That the Court erred in holding and deciding that the Patent Office made a finding that "The socket support of plaintiff's claim with the squarred end is equivalent to an element in the Mandeville Patent consisting of a shank provided with a square nut-receiving chamber, and also is equivalent to the element in the Miottel Patent shown as a recessed socket support. In other words the squarred male element was held an equivalent of the recessed female element."

(4) That the Court erred in holding and deciding that the effect of a preliminary action of the Patent Office, which preliminary action was modified or set aside by a following final or different action, can have any binding or persuasive effect upon this Court in construing said patent.

(5) That the Court erred in holding and deciding that the final statement of the applicant, who was later the patentee of the patent involved in this litigation, did not succinctly point out the exact patentable features involved in his patented invention, namely:

“The two claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end pivotally **secured** to the handle, and the other end adapted to be **slidably received** in the bore of the nut engaging socket. With this construction applicant needs no fastening means for holding the socket support and the socket together, depending merely upon the frictional engagement between the parts.

“The references also fail to disclose a socket support or a socket assembled together and held against relative pivotal movement, the socket support being pivotally **secured** onto the handle and adapted to be held at various positions with respect thereto.”

It is to be noted that the underlining is not included in the citation but is added for the purpose of emphasis in this petition.

(6) That the Court erred in holding and deciding that the Edmands' patent, which was not cited as a reference by the Patent Office but was cited by defendant as a purported example of the

prior art, shows any feature or element not shown in the references cited by the examiner, or that defendant contends that said Edmands Patent shows any feature or element not thus shown; that is, that said patent cited by defendant is a disclosure of anything not shown in the references relied upon by the examiner when acting upon the Eagle application.

(7) That the Court erred in holding and deciding that the specific feature “The Edmands patent has the same features except that the socket support and the socket itself **are in one** piece and are adapted to be **removed** from the pivot pin when the eye is opposite to one edge of the lug”, underlining not being present in the Court’s opinion but being included in this petition for the purpose of emphasis, does not constitute that quality of invention to lend patentability to plaintiff’s advancement in the art to which said patent is directed.

(8) That the Court erred in holding and deciding that the fact that in some operations or uses of the two wrenches, namely the Eagle wrench and the Edmands’ wrench, which are being compared, are similar, is not controlling because there are **other new results** not attainable by the use of the Edmands’ wrench, these results being:

1. The Eagle wrench is adapted to accommodate a number of wrench sizes and said accommodation is permitted by the use of standard sockets, which are removable from their socket sup-

ports, while in the Edmands' wrench said accommodation is possible only by the use of a number of integral wrench heads, each of which wrench heads will drop off in one position, and thus the Edmands' wrench is not a one-handed wrench for the reason that one hand must be used in said position to hold said wrench head in place upon its handle; that if the eye of a particular wrench head is closed to make it pivotally **secured** to the handle, it is not capable of being removed for the purpose of substitution, which is the principal purpose of the Edmands' invention and which is the only purpose which would tend to give it any commercial value whatsoever.

2. The Edmands' wrench is not adapted to accommodate **standard sockets**, but said wrench heads being integral structures must necessarily command a higher price and involve special manufacturing tools and processes.

(9) That the Court erred in holding and deciding that the wide-spread use of standard sockets followed the date of the Edmands patent in 1906, rather than preceded it.

(10) That the Court erred in holding and deciding that the steps taken by the patentee Eagle were apparent and were the result of a need sprung up and which was easily and quickly solved, said holding being contrary to the undisputed testimony that the Plomb Tool Company, one of the plaintiffs, spent years in attempting to solve this

problem and the witness Carlborg who was in the employ of the defendant corporation at the inception of the infringing manufacture and sale complained of in the complaint, could not duplicate the Eagle wrench even after it had been illustrated to him.

ASSIGNMENTS OF ERROR

The District Court permitted the petition to be filed and orally submitted, but denied said petition and plaintiffs below filed the following assignments of error:

(1) Because the District Court adjudged and decreed that the improvement described and claimed in claim one in the letters patent of the United States granted to Samuel Eagle June 7, 1921, number 1,380,643, for an improvement in wrenches, and in which patent plaintiff John William Langs holds an undivided interest and in which patent the Plomb Tool Company holds an exclusive license, did not involve invention and that said claim is invalid and void.

(2) Because the District Court failed and refused to adjudge and decree that said Samuel Eagle invented a new, useful and patentable improvement in wrenches, duly defined and claimed in said claim one of said letters patent.

(3) Because the District Court erred in not adjudging and decreeing that said claim of said

letters patent is valid, that the defendant infringed the same, and that the plaintiffs in their respective relations under said letters patent are entitled to relief from said infringement as prayed for in the bill herein.

(4) Because the said decree of the District Court is in prejudice of the substantial rights and equities of the plaintiffs in the premises.

ARGUMENT AND AUTHORITIES

Summarized Contentions

In order to keep conveniently before the Court the various issues bearing upon Appellee's defense of lack of invention, they might be summarized as follows:

(1) The defense of lack of invention is based almost solely upon the wrench disclosed in the Edmands' patent. **It is not contended that the Eagle patent is void for lack of novelty** over the Edmands' patent, but that the differences between the Eagle wrench and the Edmands' wrench do not define a patentable invention. Judge Fee, in his opinion, pointed out that the differences between said wrenches are that "the Edmands' patent has the same features except that the socket support and the socket itself are in one piece and are adapted to be removed from the pivot pin when the eye is opposite to one edge of the lug".

(2) The Edmands' patent was issued in 1906.

The Eagle patent in question issued in 1921, therefore a period of over fifteen years elapsed between the issuance of the two patents.

(3) It is not contended by the defendant below that anyone **perceived** or **conceived** that the difficult problem of providing a wrench (1) adapted to accommodate a number of nut sizes and (2) adjustable sufficiently to avoid obstructions in the use of such a wrench about an automobile, for example, could be attained by modifying the old Edmands' wrench so that all of the parts would be tied effectively together and constitute a one-handed wrench, and so that it could use standard sockets.

(4) The Edmands' wrench represents merely a paper patent and no one seriously contends that said wrench proved practical or useful, and it never took its place in the art as a useful tool. That is, the issuance of the Edmands' patent had no effect upon the state of the art except that it was a development which was called to the attention of the art by the issuance of a patent and was practically ignored by said art.

(5) The ignoring of the Edmands' wrench by the art was not mere lack of appreciation thereof. This is most conclusively demonstrated by the fact that the defendant below could have adopted said wrench and used it without fear of infringement when it entered the wrench field with a flex-handle wrench in 1924, because at that time the Edmands

patent had expired and was public property.

(6) The need for a flex-handle wrench was not one which sprung up due to any sudden change in the art, but the need for a wrench of this character was appreciated by the art for a long period of time and during this entire period manufacturers and mechanics in the field attempted actively to devise a wrench capable of attaining the result produced by the Eagle wrench.

(7) This problem was troublesome and important to the art, as is demonstrated by the fact that as soon as the problem was solved by the patentee Eagle, the wrench immediately was adopted until over one-half of the wrenches sold, or approximately 125,000 annually, were Eagle flex-handle wrenches.

(8) The field in which the flex-handle Eagle wrench has its greatest application is in the automobile repair business. This has occupied the attention of many thousands of mechanics and technical engineers and so it is proper to assume that greater attention was paid to the problem of satisfying the need than if the art were one in which the need was evident to only a few persons. In this regard, the Edmands' patent was directed to the same art (T. 56, lines 13-18). In other words, the Eagle wrench was adapted to solve a known deficiency in the art, not that the art was modified and new tools were designed to accommodate said modification.

(9) Each mechanic in the art had a personal and selfish reason for devising such a wrench, beyond his natural desire to create, because wrenches of this character were purchased by the mechanic personally. It was necessary for each mechanic to provide himself with from twenty-five to two hundred solid handle wrenches of the reasonable value of several hundred dollars to produce the same results attained by from one to three different sizes of Eagle flex-handle wrenches and a set of standard sockets.

(10) When the Eagle wrench was devised and introduced into the art, its commercial success and its adoption and acceptance was instantaneous and its infringement by defendant below demonstrates what the art, including this infringer, thought of said improvement.

(11) The Eagle wrench is now standard equipment with automobile mechanics and they abandoned their other tools which they had previously used.

(12) The Appellant Plomb Tool Company acknowledged its infringement of the Eagle patent and secured a license thereunder, while the Appellee deliberately infringed and refused to discontinue infringement upon receipt of notice.

(13) Defendant below, Appellee herein, sets up its defense of lack of invention based not upon its own **experience**, nor upon the **experience** of anyone else, but only upon a **theory** of what might have

been done **if**

(a) Someone had **perceived** that the solution to this vexing problem of providing a multi-purpose wrench could be achieved by a flex-handle wrench with standard sockets;

(b) Someone had **conceived** that this result could be accomplished with a handle comprising two parts ~~not merely~~ joined by a simple axial pivot, one short section of said handle constituting a **support for standard sockets** and held against free rotation about its pivot axis by a spring-pressed member, so that the other portion of the handle might serve as an effective lever when arranged at an oblique angle with said socket support, as well as a flexible member, to avoid obstructions.

(c) Someone had **reduced it to practice** by incorporating such a structure in a wrench having the function and result of the Eagle wrench, as is set out in the single claim of the Eagle patent.

(14) Appellee herein sets up its theory of lack of invention in the face of its own unsuccessful experience in attempting to devise a wrench to meet the difficulties encountered. Its own wrench designer, even after having pointed out to him the perception that a solution was possible to said problem and the correct conception, was unable to reproduce said wrench from memory in an efficient manner. Also, the president of P. & C. Hand Forged Tool Company, Appellee herein, in an at-

tempt to avoid direct infringement and to improve upon the Eagle wrench, devised a modification thereof and secured a patent thereon, but still manufactured the Eagle type wrench in its identical form as claimed in the Eagle patent.

What Constitutes Invention

As was said by Justice Brown in **McClain v. Ortmyer**, 141 U. S. 419, 427, 12 Sup. Ct. 76, 35 L. Ed. 800, the word "invention" "cannot be defined in such a manner as to afford any substantial aid in determining whether a particular device involved an exercise of the inventive faculty or not". The act of inventing, however, consists of three definite steps. The authoritative work of **Robinson on Patents**, Vol. 1, page 116, paragraphs 77 and 79, points out these steps as follows:

1. The perception of a need;
2. The conception of a mode of attainment;
and
3. Reduction to practice.

The first two steps of "what to do" and "how to do it" are mental acts and the last step of physically making or performing the operation is a physical act.

"Section 77. Inventive Act Twofold: Mental and Physical. Every invention contains two elements: (1) An idea conceived by the inventor; (2) An application of that idea to the

Production of a practical result. Neither of these elements is alone sufficient. An unapplied idea is not an invention. The application of an idea, not original with the person who applies it, is not an invention. Hence, the inventive act in reality consists of two acts; one mental, the conception of an idea; the other manual, the reduction of that idea to practice. It is especially in the mental act that the questions which confront us find their answer.

“Section 79. Mental Part of Inventive Act Includes a Conscious Perception of the Idea Generated by the Creative Faculties. Moreover, no exercise of the creative faculties can form a part of the inventive act, unless the idea resulting from such exercise is fully apprehended by the mind of the inventor. To create by accident without a recognition of the fact or nature of his own creation, and consequently without the power to repeat the same creative act, is not invention. While previous intention to create in this especial form, or even to create at all, is not required, it is essential to the inventive act that the inventor should not only **conceive**, but should also **perceive** his original idea, and should do both so clearly as to make this idea an actual addition to his fund of knowledge, and to be able to communicate it to the public.”

Robinson on Patents, Vol. 1, p. 116, 121.

The familiar analogy between the performing of an inventive act and the discovery of a path to a desired goal illustrates these respective steps.

It is necessary not only to be looking for a path (perception of a need), and to forecast its location (conceive the mode of attainment), but it is necessary also to blaze, construct and traverse such path (reduce to practice) in order to complete said discovery (invention).

Robinson adds:

“Section 80. Mental Part of Inventive Act Complete Only When the Idea Generated is Sufficiently Developed for Practical Application. Again, the idea in which this exercise of the creative faculties results must be complete and capable of practical application. To recognize a public want, to entertain vague notions of some mode in which that want may be supplied, to put forth efforts which approach, however nearly, to the solution of the problem and yet leave it unsolved are not enough. Such operations never pass beyond the line of mere conjecture or of unsuccessful experiment. They **create** nothing; and though they tend to stimulate and aid creative genius, they are in themselves useless both to the inventor and the public. To him alone whose mind conceives the perfect, practical, operative idea,—that idea which when embodied in tangible materials, will accomplish the desired re-

sult,—belongs the right of the inventor and the credit of performing the inventive act.

“Section 83. Mental Part of Inventive Act Complete Whether Prolonged or Instantaneous.

The law draws no distinction between those operations of the creative faculties which manifest themselves in long-continued study and experiment, and those which reach their end by sudden intuition or apparent accident. Here also is a region in which human knowledge is at fault. Indeed, it may well be doubted whether the creative act is ever otherwise than instantaneous and intuitive, and whether research and reflection ever do more than clear the way for, and dispose the mind toward those sudden apprehensions of the truth to which in literature and the arts we give the names ‘invention’ and ‘discovery’. The law does not attempt to settle questions which thus lie beyond the reach of mental science. Whenever the creative faculties have evidently been at work, it inquires neither as to the method nor the duration of their exercise. The patient labors of a lifetime, the unpremeditated flash of an original thought upon the mind, the revelation made to an appreciative intellect by some trivial accident, all stand upon an equal footing both in character and merit, and are entitled to the same reward.

“Section 84. Mental Part of Inventive Act

Complete Though Aided by External Suggestions. Nor does the law take notice of the aid which the inventor has derived from the suggestions, writings, or experiments of others, provided the creative act be truly his. Unless the idea which constitutes the spirit of his invention has been obtained by him from other persons, complete and capable of practical application, it is his own creation and not theirs, however closely their imperfect notions may approach to his. The law can draw no line between the ideas suggested to his mind by such external objects, and those which his mind generates from these suggestions. It can look only to the words and things from which his ideas may have been derived, and if it cannot find in them, apparent to the public view, the entire original idea as claimed by the inventor, it does not venture to dispute his right.

“Section 85. Mental Part of Inventive Act Complete Though the Idea Generated Be of Small Value. Lastly, the magnitude of the results which flow from the inventive act furnish no test by which its merits are determined. The advance made by the inventor may be slight, the benefit conferred upon the public may be small, but though these considerations influence the recompense which he eventually receives, they do not affect the intrinsic character of the creative act. The exercise of the

inventive faculties in the production of a practical result having been once conceded, the degree and quantity of inventive skill which it involves are immaterial. It falls within the purview of the law as an invention, and is entitled to the same protection as if it were the most important of discoveries.”

Following the analogy, previously indicated, it might be said that it is not necessary that the discovered path leads through an unchartered wilderness (pioneer patent). But on the other hand, it might follow along a maze of well-beaten paths (crowded art) utilizing a portion of each intersecting path (combination of old elements) to arrive at the desired goal. We cannot measure the path to see whether it exceeds a given pre-determined length (the amount of change), nor can we consider the fact of whether the discoverer of said path was inspired (flash of genius) or produced said discovery by the more time-consuming method of trial and error (experimental processes) to find a yard stick to measure the **quality** of the discovery (invention).

All of these simple steps, as applied in this homely analogy, have been clothed in legal terminology, particularly applied to patents, until it some times seems that elementary principles are forgotten or ignored. This fact was recognized by Robinson (*supra*) as early as 1890, and reverting to elementary principles, as outlined by this

learned and authoritative writer, is of assistance.

Prefacing the portions set out above, Robinson says:

“Section 73. Difficulties of the Subject Caused by Failure to Apprehend the True Nature of An Invention. In discussing these topics we shall encounter certain difficulties, inseparable from any system of positive law which attempts to regulate matters relating to imperfectly understood mental or physical facts. Such systems are not the development of evident and necessary truths, but are built up through the interpretations given by the courts to the terms in which the arbitrary will of the legislative body is expressed; terms not always carefully selected, nor accurately adapted to the subjects which they are intended to control. In all such cases, the nature of the fact to which the law relates, as well as the reason of the law and the principles by which its application must be governed in order that the system may be permanent and beneficial to the state, are of gradual and late discovery; and the efforts of the courts to grasp and formulate them are characterized by many apparent contradictions, by much uncertainty of language, and by the frequent confusion of ideas which are, in themselves, essentially dissimilar. These difficulties are perhaps less formidable in the present system than in any other, owing partly to its narrow limits, partly

to the fortunate expressions which are contained in both the American and English statutes, but they nevertheless exist; and hence, in the examination of the text-books and reported cases, the exercise of constant caution becomes necessary, lest by the overlapping and interlacing of propositions which are really distinct, or by the substitution of the rules governing one branch of the subject for those which properly control another, the reader should be needlessly misled. To remedy as far as possible these evils, our own examination of the system will begin with an endeavor to ascertain the nature and essential attributes of an invention.”

Following this analogy, we might consider the starting place of said path and the location of the old paths, the state of the art; the travelers and those interested in travel along this path, or along the previous paths, those skilled in the art; the search for the new path, perception; the forecasting of its eventual location, conception; the demonstration of its location and the feasibility of traveling along said path and the blazing and construction thereof, reduction to practice. The grant of a franchise covering the right-of-way along said path might be compared to the grant of letters patent; the various integral portions of the path might be considered the elements of the claimed invention, and all of the right-of-way, or the entire path might be considered the combination claimed; the

amount of eventual travel over the right-of-way might be compared to the commercial success of the invention and trespass over said right-of-way compared to infringement and so on through the entire terminology as applied to patents.

Therefore, the three component parts or steps in the creation of an invention, namely, (1) what to do, or perception; (2) how to do it, or conception, and (3) the doing of it, or reduction to practice, are of equal importance in producing an invention.

Invention might thus be described as a stool resting upon the three legs, perception, conception and reduction to practice. Each is of an importance equal to that of either of the others and must support equal weight. Therefore, if one leg were missing there would be no support given by the other two legs. Perception and conception without reduction to practice does not represent a complete invention. It likewise would be improper to consider the inverse of this premise in measuring invention—namely, first presuming that you have a stool with two legs and then measuring how difficult it would be to fashion and fit the third one. Likewise identity of invention is present only when devices have the identical or equivalent structure, function and result and when they are directed toward the solution of the same problem. That is, two stools being compared must each have all three legs and must look alike, act alike, and produce the same result.

It is therefore erroneous to stress the physical step over the mental steps in testing whether or not an invention has been made, for frequently

“‘It often requires as acute a perception of the relation between cause and effect and as much of the particular intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*, and this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before.’”

Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 198, 39 L. Ed. 275.

The line of defense adapted by Appellee herein is strikingly similar to that urged by the defendant in **Carnegie Steel Co. v. Cambria Iron Co.**, 185 U. S. 403, 446; 46 L. Ed. 968, 989, which commented upon the opinion of Mr. Justice Bradley in **Loom Co. v. Higgins**, 105 U. S. 580, 591: ‘But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice * * * Now that it has succeeded, it may seem very plain to any one that he could have done it as well.

This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.'

The fallacy of a defense to establish the presence or lack of invention upon the ease or difficulty of the reduction to practice is that it first must be assumed that the two mental steps in the act of inventing have been done, namely:

(1) That someone **perceived** that there was a need of forming the combination covering the patented structure; and

(2) That some one **conceived** that said end could be attained in some definite manner. After it has been pointed out that there is a need for doing something and that it can be done in a certain manner, many persons can follow the suggestion made to reduce said device to practice. This is nicely put by Mr. Pendleton (T. 152):

"It would amount to invention, to take the elements submitted and make an Eagle wrench out of it. Obviously after the Eagle wrench has been constructed it is easy enough to look back and say that anybody can do it, because hindsight is always easier than foresight."

This might be compared to the average problem which must be first perceived and a satisfactory

structure conceived by an engineer and plans produced for accomplishing the desired result. After a structure has been devised and blue-prints made for producing said structure, any mechanic of ordinary skill can follow the plans as incorporated in a blue-print thus merely following the suggestions of the designer.

Following the analogy between the inventive act and the discovery of a path to a desired goal, the trail builder is not given the advantage of having pointed out to him the probable route he is to follow and given the assurance that following said general route he will successfully attain his goal. Said trail builder on the other hand, after he has completed the first step of perceiving that there is a need for a trail between his starting place and his goal, must seek out **some** successful path to said goal along **some** line and with the **hope** that he will eventually be able to find a path. There may be a maze of intersecting paths leading to other goals, there may be other and different paths leading to the same goal. If the path or route considered as a whole is new, **and novelty is not an issue in this** case, and said path leads from the starting point to the goal in a new and better manner and thus produces a new and beneficial result, said route will be considered a new path independently of whether it traverses portions of intersecting paths leading to the same or to different goals, or whether it is directed across unmarked territory. In the present case, it is not

a proper test for invention to consider the Eagle wrench as a completed invention, then to compare it with every previous example of the prior art and independent of the results or functions of the various examples of the prior art, and then to select the device having the greatest similarity thereto and to point out the various changes and modifications which **might** be made and to predicate invention upon the ease or difficulty with which said changes can be made. That would be hindsight rather than foresight. The proper test is to determine whether anyone has perceived the need of making said changes, had conceived a mode of accomplishing the end desired, and has accomplished said end.

“Patentability has often been found ‘in discovering what is the difficulty with an existing structure’ and correcting the same, even though ‘the means’ are old and their mere “adaptation to the new purposes involves no patentable novelty.’ *Meihle, etc., Co. v. Whitlock*, 223 Fed. 647, 650, 139 C. C. A. 201. Hindsight, or wisdom after the fact, has always been looked upon with disfavor; e.g., *Faries Co. v. Brown*, 121 Fed. 547, 550, 57 C. C. A. 609.”

Kurtz v. Belle Hat Lining Co., 280 F. 277.

The same line of attack was commented upon in *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275:

“And this is not the less true if, after the thing is done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. The apparent simplicity of a new device often leads an unexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that, with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to anyone before. The practiced eye of the mechanic may be safely trusted to see what ought to be apparent to everyone.”

The late case in this the 9th Circuit of **Bankers Utilities Co. v. Pacific Nat. Bank**, 18 F. (2d) 16, 18, discloses a defense of a similar nature and several citations from the opinion are pertinent.

“Anticipation is not made out by the fact that a prior existing device, shown in a prior patent, may be easily changed so as to produce the same result as that of the device of the patent in suit where the prior device was in common use, without it occurring to any one to adopt the change suggested by the patent in suit. *Blake Automotive Equipment Co. v. Cross Mfg. Co.*, 13 Fed. (2d) 32. In their position plaintiffs are fortified by the presumption attending a patent. *Wilson & Willard v. Bole*, 227 Fed. 607; *Heinz v. Cohn*, 207 Fed. 547; *San Francisco v. Beyrle*, 195 Fed. 516, and by

the fact that their device is a commercial success and has brought on imitation (application of *McClaire*, 16 Fed. (2d) 251; *Sandusky v. Brooklyn Box Toe Co.*, 13 Fed. (2d) 241; *Carson v. American Smelting Co.*, 4 Fed. (2d) 463; *Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co.*, 295 Fed. 748; *Globe Knitting Works v. Segal*, 248 Fed. 495; *Morton v. Llewellyn*, 164 Fed. 697.”

Patentable Invention—Authorities

The authorities were ably collected and differentiated by the Court in the case of **Kurtz v. Belle Hat Lining Co.**, 280 F. 277, 279, involving a hat lining patent which had been held to display nothing patentable in the District Court. The Circuit Court of Appeals for the Second Circuit, on reversing the lower decree, said:

“Thus is presented the question of invention, admittedly one of fact, yet also one as to which courts, composed of lawyers, have long been anxious to act with uniformity and along lines of thought which will result in precedents, instead of mere incidents. Despite the warning of Justice Brown in *McClain v. Ort-mayer*, 141 U. S. 419, 427, 12 Sup. Ct. 76, 35 L. Ed. 800, that the word ‘Invention’ ‘cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involved an exercise of the inventive faculty or not,’ the effort still con-

tinues. Prof. Robinson analyzed all of these attempts down to his date of publication (1890) which was but a few months before Brown, J., pronounced the effort futile. *Rob. Pat. Vol. 1, p. 116 et seq.* Yet there remains as always worthy of consideration the learned author's dictum that 'the mental faculties involved in the inventive act are the creative and not the imitative.' Section 78. In comparatively late years efforts at positive statement have been limited to such generalizations as that—

“‘Invention, in the nature of improvements, is the double mental act of discerning, in existing machines or processes or articles, some deficiency, and pointing out the means of overcoming it.’ *General Electric v. Sangamo, 174 Fed. 246, 251, 98 C. C. A. 154, 159.*’

“‘What may be called negative definitions or partial descriptions are still and always have been very common. Thus:

“‘Every result obtained by deliberate reflection and experimentation with well known appliances, or parts thereof, is not necessarily invention within the * * * patent laws.’ *Lord v. Payne (C. C.) 190 Fed. 172.*

“‘Invention involves conception of at least some function, as well as the selection of the means whereby that function can be operatively secured.’ *U. S. Co. v. Hewitt, 236 Fed. 739, 150 C. C. A. 71.*

“‘If * * * the mind advances from the known to the unknown by a transition natural to the ordinary instructed intellect, there is no invention. *Farnham v. U. S.*, 47 Ct. Cl. 207.’

“‘Again a certain device was invention because:

“‘It was a true discovery. It involved uncovering a thing which, while long capable of being done, was never before thought of. It also afforded a medium or means for bringing the discovery into practical action, and put it into the hands of others, there to be turned to pleasurable and profitable uses.’ *Cunningham v. Aeolian*, 255 Fed. 897, 900, 167 C. C. A. 217, 220.

“‘The enormous multiplication of improvement patents has produced such sayings as:

“‘It often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before.’ *Potts v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 198 (39 L. Ed. 275).’

“It has even been thought necessary of late to dwell upon the presumptions; thus a given device—

“Certainly (was) not in an exact repetition of the prior art. It attained an end not attained by anything in the prior art. * * * It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. Its simplicity should not blind us as to its character; * * * knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing * * * was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration.” *Diamond, etc., Co. v. Consolidated*, 220 U. S. 428, 434, 31 Sup. Ct. 444, 447 (55 L. Ed. 527).

“(1) The foregoing quotations, which might be multiplied, only prove the truth of Justice Brown’s dictum, and enforce the other truth which we attempted to point out in *Kimball*

v. Noesting (C. C. A. 262 Fed. 148, viz: that invention is a question to be decided on the evidence. The problem is the more difficult because evidence as to invention does not often give rise to conflicts of fact in the ordinary sense of that phrase; it does, however, give rise to acute differences of opinion as to the inferences to be drawn from facts in themselves uncontradicted; and this is as true of what is called 'opinion evidence' as it is of testimony regarding things visible or tangible. It is probably for this reason that experience has dictated some canons of decision (they are not rules of law) as to how the problem of invention is to be approached.

“(2) Thus it has been well said that ‘in determining this question it is proper to bear in mind the condition of the trade as well as the art to which the patent in suit is allied.’ Warren, etc., Co. v. American, etc., Co. (C. C.) 133 Fed. 304, 306. And similarly that the ‘effort (of the court) must always be to view the subject matter from the standpoint of the art concerned.’ Kurtz v. Blatt (D. C.) 263 Fed. 392, 394. It is also the duty of the court to construe patents liberally, so as to effect their real intent. Bossert v. Pratt, 179 Fed. 385, 387, 103 C. C. A. 45. And cf. Auto Vacuum Co. v. Sexton, 239 Fed. 898, 153 C. C. A. 26.

“Yet when all has been done, the question of invention may ‘be answered differently by per-

sons of equal intelligence.' *Bossert v. Pratt*, supra, 179 Fed. 386, 103 C. C. A. 46. We think, also, courts have always endeavored to observe at least some of Prof. Robinson's guiding rules (supra), as that the nature of an invention is usually ascertained from examining the inventive act from which patented matter results; for invention always generates a new idea, although a patentee must create the means, and not merely perceive the end.

"(3) Result is that study of well-considered decisions under this head will always show that result is reached very largely from examination of 'the results obtained.' *Doble v. Pelton, etc., Co.* (C. C.) 186 Fed. 526. Results are described by abstract nouns, like 'simplicity', 'economy', etc., and, while it is always admitted and stated that the mere attainment of such desirable results is not invention, they always have been and must be used as evidence or indicia of invention, and the weight and probable effect of such marks of excellence have varied, and always must vary within limits according to the personal equation of the fact trier.

"Thus, while neither simplicity, cheapness, nor utility—nor all three combined—constitute invention, they have been deemed most potent evidence thereof. *Barry v. Harpoon Co.*, 209 Fed. 207, 126 C. C. A. 301. Simplifying form

and cheapening cost have been accorded the same potency (Hunt v. Milwaukee, etc., Co., 148 Fed. 220, 78 C. C. A. 116), although, of course, such excellence must always be accompanied by a 'different result' (Bernz v. Schaefer (D. C.) 205 Fed. 49, 52). Indeed, it has been thought that simplicity alone, though 'cited as evidence of lack of invention, to our minds shows a high order of novelty and invention' (Consolidated, etc., Co. v. Window Glass Co. (C. C. A.) 261 Fed. 362, 375), and to the same point Hills v. Hamilton Co. (D. C.) 248 Fed. 499.

"Utility, though itself not invention, nor conclusive evidence thereof, has been practically accorded the greatest weight. Union, etc., Co. v. Peters, 125 Fed. 601, 60 C. C. A. 337; Woerheide v. Johns-Manville, 220 Fed. 674, 136 C. C. A. 316. Cf. Greenwald v. LaVogue, 226 Fed. 448, 141 C. C. A. 278. Novelty, likewise, has been pushed to the front as a piece of evidence. Concrete, etc., Co. v. Meinken (C. C. A.) 262 Fed. 958, 965.

"The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think. David v. Harris, 206 Fed. 902, 904, 124 C. C. A.

477; *Smith v. Peck* (C. C. A.) 262 Fed. 415, 417. Commercial success has been too recently and too often considered to justify much citation; but, however unsafe as a guide (*Boston, etc., Co. v. Automatic* (C. C. A.) 276 Fed. 910), it has always been a powerful piece of evidence, especially when the prior art shows no success along the same lines (*David v. Harris, supra*).

“The list of laudatory epithets descriptive of what is considered evidence is by no means exhausted; the ‘marked superiority of the article’ constructed under the patent (*Frost v. Cohn*, 119 Fed. 505, 56 C. C. A. 185); ‘a marked improvement in product’ (*Greenwald v. Enochs*, 183 Fed. 583, 106 C. C. A. 351); the ‘ingenuity and popularity’ of the patentee’s product (*Fligel v. Sears*, 254 Fed. 698, 166 C. C. A. 196); the ‘unchallenged supremacy’ of the same (*Consolidated, etc., Co. v. Firestone, etc., Co.*, 151 Fed. 237, 80 C. C. A. 589); and even the aid given by the patented article in ‘advertising and identifying’ an entirely different product (*Fonseca v. Suarez*, 232 Fed. 155, 156, 146 C. C. A. 347)—have all been used, and we think properly so, as evidence of invention.

“Patentability has often been found ‘in discovering what is the difficulty with an existing structure’ and correcting the same, even though ‘the means’ are old and their mere

patentable novelty.' *Miehle, etc., Co. v. Whitlock*, 223 Fed. 647, 650, 139 C. C. A. 201. *Hindsight*, or wisdom after the fact, has always been looked upon with disfavor; e.g., *Faries Co. v. Brown*, 121 Fed. 547, 550, 57 C. C. A. 609.

“(4) If we viewed this hat lining, or any hat lining, in the light of our own experience, it would appear trivial and unworthy the dignity of patent protection; but, looking at it through the evidence and (we hope) with the eyes of the hat lining trade, this patent represents a large and successful business. It is in the minds of all those who deal in hat linings, of the utmost importance. No one ever made a lining of such simplicity, cheapness, and general adaptability as has Kurtz, and he has done it by mechanical means of winning simplicity, to all of which defendant has testified by deliberately imitating Kurtz’s product and engaging in expensive litigation to defend the imitation.

“We are of opinion upon this record that Kurtz’s hat lining is novel, useful, and displays patentable invention.”

OPINION OF DISTRICT COURT

It would appear that Judge Fee, in rendering the opinion upon which he based his decree, failed

to appreciate the difference between a claim and the elements of a claim going to make up a combination. In the first page of his opinion (T. 160) Judge Fee cites the fact that the Patent Office, in adjudicating the various claims put forward by the patentee Eagle then an applicant before the Patent Office, held various elements in the different combination claims to be old. He states that the **elements**, which he sets out specifically, are **claims**. It is submitted that it is immaterial, with regard to the patentability of the **combination** claimed, whether or not the **elements** are old per se. In considering combination claims, it is even **presumed** that the elements are old.

The Court cites the final contention of the patentee, then an applicant before the Patent Office, in which he differentiates his allowed claim, which is now at issue, from the art of record. This statement of the patentee, then an applicant, clearly distinguishes the claim from the art of record and the art cited by Appellee herein, and the Court in its opinion correctly summarizes these differences in the second and third paragraphs of his opinion on page 162 of the Transcript, but **searching for new elements** the Court concludes at the bottom of page 161 of the Transcript that **he finds no new elements**.

In its opinion, the Court states (T. 163, third paragraph):

“It has been noted above that Edmands

adopted the device of an interchangeable female member on his wrench in 1906. Since that time there have grown up the use of interchangeable standard sockets which are spoken of by the witness.”

As has been pointed out, said statement is not supported by the testimony, and on the other hand the only testimony covering the time when standard sockets were first used is that of C. F. Carlborg, witness for Appellant, who testified that his first experience with sockets was when he was an automobile mechanic (1905-1915) (T. 124). It is not believed that the Appellee herein would contend that “the use of interchangeable sockets grew up since 1906.”

It is further submitted that the statement “It is inconceivable that anyone, whether mechanical or not, if informed of the need of adapting the patented device (Edmands) to the use of the standard sockets could not have evolved the Eagle patent” does not represent a true test for the quality of invention. **This statement is based upon the premise that the invention has previously been perceived and conceived and measures merely the ease or difficulty of its being reduced to practice.**

The case of **George Frost Co. v. Cohn**, 112 F. 1009, 1011-12 (commonly referred to as the garter case), involves a similar defense, and relates to the use of a rubber covered stud in hose supporters. The solution to this problem is even more

simple than the claimed invention and the patented claim in question. The Court said:

“* * * For many years an army of inventors and skilled mechanics were at work to remedy these defects. All sorts of expedients were resorted to, but the old difficulties remained. At length Gorton substituted for the metal button a button with a rubber shank, and the thing was done. This, the defendants insist, was a perfectly obvious thing to do. Every one who wore goloshes, or rode a bicycle, or placed a band around his papers, or played golf or tennis knew the properties of rubber. There was not an intelligent mechanic who did not know that rubber is more resilient and clinging and less likely to cut woven fabrics than steel or iron.

“Here was a situation, say the defendants, where a hard, unyielding substance had been tried and found wanting and where a soft, gripping substance was needed in its place. Rubber possessed all the required qualities and everyone knew it. What then was more natural than to use rubber? This argument has been so often considered by the courts that little of value can be added to the discussion, and, after all, the old answer is the best answer,—‘No one did it before.’ The record shows that for at least ten years prior to Gorton’s invention men skilled in the art were endeavoring to

make an operative supporter and several had so far succeeded as to secure patents, but always along the same lines. There was always the metal button, there was always the fabric clamped between two metallic surfaces. Rubber, in almost every conceivable shape and form, was everywhere in use, but no one thought of it. Like a jewel lost in a crowded thoroughfare,—multitudes pass it unnoticed, some actually tread upon it, others stop and gaze for a moment, but hurry on deeming it some worthless tinsel; at last comes one who recognizes its value and picks it up. Others might have done this it is true, but they did not; he did, and is entitled to the prize which he has rescued from the mire. If one should attempt to snatch the gem from the finder on the ground that he passed it frequently and could have picked it up as well as not, he would in all probability be promptly turned over to the police as a thief or a lunatic. It is this capacity for accomplishing results, this faculty of seeing what others fail to see and hearing what others fail to hear which has always distinguished success from failure and the inventor from the mechanic. ‘In the law of patents it is the last step that wins,’ says the Supreme Court. This is the step which Gorton took.”

It is further submitted that the statement contained in the final paragraph of Judge Fee’s opinion:

“But it would be unfair and unjust to permit one by a clever **combination of devices old in the art** and which already belong to the public, to monopolize a field and take from the people at large what already belongs to them” is contrary to all of the authorities.

IT IS NOT ESSENTIAL TO A PATENTABLE COMBINATION THAT ANY OF THE ELEMENTS BE NEW AND IN FACT IT IS THE USUAL COMBINATION WHERE ALL OF THE ELEMENTS ARE OLD PER SE.

“Inventions pertaining to machines may, for the purpose of such explanations as the court find it necessary to give you in this case, be divided into four classes. First, where the invention embraces the entire machine, as a car for a railway, or a sewing-machine, as was decided by this court in a well-known case. Such inventions are seldom made, but when made, and duly patented, any person is an infringer who, without license, makes or uses any portion of the machine. Under such a patent the patentee holds the exclusive right to make, use, and vend to others to be used, the entire machine; and if another, without license, makes, uses, or vends any portion of it, he invades the right of the patentee.

“The second class of inventions referred to are those which embrace one or more of the adaptation to the new purposes involves no

elements of the machine, but not the entire machine; as the coulter of the plough, or the divider of the reaping-machine. In patents of that class any person may make, use or vend all other parts of the machine or implement, and he may employ a coulter or a divider in the machine mentioned, provided it be substantially different from that embraced in the patent.

“The third class of machines which are to be mentioned are those which embrace both a new element and a new combination of elements previously used and well known. The property in the patent in such a case consists in the new element and in the new combination. No one can lawfully make, use, or vend the machine containing such new element or such new combination. They may make, vend, or use the machine without the patented improvements, if it is capable of such use; but they cannot use either of those improvements without making themselves liable as infringers.

“The fourth class of machines to be mentioned are those where all the elements of the machines are old, and where the invention consists in a new combination of those elements, whereby a new and useful result is obtained.

“Most of the modern machines are of this class, and many of them are of great utility and value.”

Union Sugar Refinery v. Matthiesson, 24 Fed. Cas. 686, 687.

A number of other cases are collected in 48 C. J. Patents, Sec. 87, to the effect that:

“Where there is no direct anticipation (of a combination) invention is not negatived by the mere fact that some or all of the elements of the combination are old. The question is whether they have been newly combined so as to effect new and useful results.”

The principles which govern the issue here involved have also been repeatedly and clearly announced in this the Circuit Court of Appeals for the Ninth Circuit. One instance is found in the case of **Doble v. Pelton et al.**, 186 F. 526, so ably decided by the late Judge Van Fleet (referred to by the C. C. A. 2nd in its above abstracted opinion expressed in **Kurtz v. Belle Hat Lining Co.** (*supra*).

The patent there considered was the reissued patent to Doble, February 27, 1906, No. 12,460, for an improvement in Nozzles for Impact Water Wheels. The problem involved was the providing of a needle valve arranged to permit the use of exterior means for moving the needle valve back and forth.” In order to accomplish this the nozzle had to be curved, but this resulted in a reactive force tending strongly to turn the nozzle “To overcome this tendency, Doyle conceived the idea of **curving** the nozzle so as to place the axis in the plane of the nozzle’s sinuosity.”

Infringement was not denied; but the defense alleged non-invention, just as in the case at bar. Judge Van Fleet said with regard to the contention that the invention did not represent a true combination (532):

“It is well established you **cannot construe** a patent for a combination, such as this, **with reference to novelty as to any distinct separate feature**; for that purpose **the device is to be judged as a unit, and it is to be determined from its unitary action** whether it is a valuable combination or whether a mere aggregation. **You cannot take it piece meal** and finding that its various elements have been anticipated in different devices of the prior art, none of which, however, cover **all** of the elements which are to be found in the combination, and thereby successfully sustain a defense of anticipation. You must find **all** the elements of the combination **or their equivalents** in some particular device which is claimed to be an anticipation.”

CONCLUSION

The Appellee has raised the usual defense interposed by defendants in patent infringement suits, namely: that the combination described in the claim is one which would suggest itself to a person skilled in the art and thus does not constitute invention. This defense is raised against

the presumptions of validity, novelty, utility and invention, which are established by the introduction in evidence of Appellant's patent. Further presumptions arise from the evidence of this case of commercial success, the satisfaction of a long felt want, unsuccessful efforts by others to meet the apparent need, exact imitation by Appellee, and the fact that a series of experiments was required before Appellee could arrive at the same conclusion reached by the patentee, even after Appellee was apprised of the solution of this problem, but had forgotten such solution.

THE APPELLEE HAS NOT CITED A SINGLE EXAMPLE OF THE PRIOR ART SHOWING THE COMBINATION, BUT HAS CITED PATENTS SHOWING THE INDIVIDUAL ELEMENTS SEPARATE AND DISTINCT FROM EACH OTHER.

A pertinent case involving similar defenses is **Buck v. Namm**, 22 F. (2d) 693, 696, a part of the opinion being as follows:

“Anticipation of an invention may not be found in gathering together separate and distinct prior patents, covering single elements in a combination, and then arguing that, although the new result of a combination discovered, does not appear in any such patent, nevertheless a skilled mechanic could easily discover from such patent the said new result or function on which a patent has been granted.

“I need not go into the question of equivalents, for the defendant’s box is a **copy of plaintiff’s disclosure**. The difficulty experienced by Delaney in the Patent Office, and its result in a patent, should not be lost sight of; nor should the immediate **imitation and adoption** by a large paper box manufacturer, and successful sales of the new box, be disregarded.”

Although it is necessary for a Court to determine the facts with regard to each patent and to base its opinion as to invention upon all of the facts in the prior art as adduced by the testimony, the several tests for invention commonly made with respect to said prior art, are succinctly pointed out in an opinion written by Circuit Judge L. Hand, in the Circuit Court of Appeals in the case of **R. Hoe, Inc., v. Goss Printing Press Co.**, 30 F. (2d) 271, 274:

“The more troublesome question is whether the mere combination of Gally with Scott did not require invention, assuming that, once the idea suggested itself, the rest was simple. As is often the case, the notion of uniting two mechanical means may require more originality than its subsequent execution, and in all such cases we are without objective tests. *Kirsch v. Mersereau Co.*, 6 F. (2d) 793 (C. C. A. 2). The only reliable evidence is from the history of the art. *White v. Morton*, 20 F. (2d) 311 (C. C. A. 2): how long it had to

wait for the supposed invention, what efforts had been made before, how long the need had existed, how successful was the answer.”

THE FOUR TESTS SUGGESTED FOR INVENTION THUS ARE: (1) THE LENGTH OF TIME THE ART HAD TO WAIT FOR THE INVENTION; (2) WHAT EFFORTS WERE MADE PREVIOUS TO SAID INVENTION; (3) HOW LONG THE NEED HAD EXISTED FOR SAID INVENTION; AND (4) HOW SUCCESSFUL WAS THE ANSWER.

On these questions the testimony given is unquestioned. The testimony of Charles F. Carlborg, a witness for plaintiffs, was that he had been a machinist since 1900 and that he formerly was vice-president of the defendant corporation and that special purpose tools had been made individually for each of the special purposes as long as he had been a machinist, or approximately thirty-two years. The witness J. J. Buhler corroborated Carlborg's testimony, except that his experience in the art was limited to the period from 1922 until the Eagle wrench was put out by plaintiffs in large quantities in 1928 (Test. p. 143).

The witness M. B. Pendleton, general manager of Plomb Tool Company, testified that there was a repeated demand from 1918 until the Eagle wrench was manufactured and sold by his Company for a “handle which was adapted to utilize standard sockets and during that period the plaintiff Com-

pany spent a good many hundred dollars attempting to devise some sort of jointed wrench which would be an improvement in the art and would meet the apparent demand." (T. 151) That he interviewed all the inventors who sought to interest his Company in a wrench designed to satisfy this need.

With regard to the second test as to what efforts have been made before witness Pendleton testified as above, witness Carlborg testified that each mechanic was required to purchase his wrenches and that it required an investment of several hundred dollars to have a complete set of wrenches and that mechanics devised their own tools to meet the individual needs and that mechanics generally spent "lots of time on designing wrenches" to cut down the number of wrenches and he personally spent some time on this problem (T. 138). Witness Buhler corroborated Carlborg's testimony on this point (T. 144).

The third test for invention as to the length of time the need has existed, was stated by Carlborg to be the entire length of time he was an automobile mechanic (T. 138), which was thirty-two years and the other two witnesses the length of time they had observed the problem, which was for a lesser period of time (T. 144, 151).

The fourth test concerns the commercial success of the device conceived by the patentee. This was testified to by all witnesses and is conceded

by the Appellee (T. 143). The commercial success of this wrench is uniform throughout the art, represented not only by sales made by Appellant Plomb Tool Company, but by the Appellee as well.

The Eagle wrench thus meets **every** test for invention; it has attained outstanding commercial success; it was deliberately imitated by the Defendant-Appellee, whose tool designer unsuccessfully attempted to solve the problem. After the Eagle wrench was conceived and embodied in a commercially successful device, Appellee attempted to modify it but had to return to the exact form of the Eagle wrench. The Eagle wrench produces a new result, or rather several new results: it is inexpensive, has greater utility, is more simple, strong, compact and sturdy. The trade has recognized the marked superiority of the Eagle wrench by abandoning substantially all of the previous tools. The Edmands wrench, cited as an equivalent by Defendant-Appellee, is a mere paper patent, too expensive to manufacture and too unhandy to operate.

The facts in this case are similar in many respects to those involved in the Alemite grease gun cases, the patent therein involving the automobile trade, in which the various defendants therein contended that the change from a grease cup to a grease gun with fittings, screw fitted in place, was obvious.

District Judge Anderson, in **Lunati v. Orgill Bros.** (Memo. Opinion Eq. 6666, West. Dist. of Tenn.), in finding patentable novelty in the elevator type turntables for greasing automobiles, cited the simplicity of the Alemite grease gun fittings [*Lyman Mfg. Co. v. Bassick*, 18 Fed. (2d) 29 (C. C. A.)] as a classic example of a simple combination:

“After all, most machines are based on very well known mechanical laws and their operation and principle are very obvious indeed, once some inventor has put them into successful operation.

“Probably the children of the cavemen played with squirt guns. Bayonet pin fittings are as old as bayonets. But a squirt gun with a slight suction device, fastened to an opening with a bayonet pin fitting, for the purpose of greasing the machinery of an automobile, has been with great unanimity held a patentable combination. The best tribute to the Lunati machine is the slavish imitation of it by the device sold by defendant.”

A case more in point with the facts in **Kurtz v. Belle Hat Lining Co.** (*supra*) than the present one would be difficult to conceive and thus the concluding paragraphs of the Court's opinion in that case (Brief, pp 60-61), are particularly pertinent and

bear repetition:

“Patentability has often been found ‘in discovering what is the difficulty with an existing structure’ and correcting the same, even though ‘the means’ are old and their mere ‘adaptation to the new purposes involves no patentable novelty.’ *Miehle, etc., Co. v. Whitlock*, 223 Fed. 647, 650, 139 C. C. A. 201. Hindsight, or wisdom after the fact, has always been looked upon with disfavor; e.g., *Faries Co. v. Brown*, 121 Fed. 547, 550, 57 C. C. A. 609.

“(4) If we viewed this hat lining, or any hat lining, in the light of our own experience, it would appear trivial and unworthy the dignity of patent protection; but, looking at it through the evidence and (we hope) with the eyes of the hat lining trade, this patent represents a large and successful business. It is in the minds of all those who deal in hat linings, of the utmost importance. No one ever made a lining of such simplicity, cheapness, and general adaptability as has Kurtz, and he has done it by mechanical means of winning simplicity, to all of which defendant has testified by deliberately imitating Kurtz’s product and engaging in expensive litigation to defend the imitation.

“We are of opinion upon this record that Kurtz’s hat lining is novel, useful, and displays patentable invention.”

In this case (1) the deliberate imitation, (2) the continued manufacture and sale of the Eagle wrench by P. & C. Hand Forged Tool Company, Appellee here, after attempting to improve or modify said wrench, (3) the engaging in expensive litigation to defend the imitation, (4) the failure to adopt the Edmands type wrench available to any member of the public without infringement of the expired patent, and (5) the fact that its infringing manufacture and sale constitutes one-half of its business, indicates what Appellee actually thinks of the Eagle wrench. Said attitude refutes the testimony of Appellee's witness that the Edmands' wrench is a more desirable wrench; that it is cheaper, more efficient and "will do anything the Eagle wrench will do." When Appellee entered the field of selling wrenches of this character, the Edmands' patent had expired and the wrench disclosed therein was public property. The Eagle wrench was the property of the Appellants herein. Appellee deliberately chose slavishly to imitate the Eagle wrench in all of its details, including color and external detailed appearance.

It is submitted that the art is never advanced by the implied sanctioning of deliberate piracy, where the only reason advanced for said taking is that **anyone could have done as well if he had thought of doing it.**

It is submitted that upon the evidence in this case the decree of the lower Court is erroneous and should be reversed.

Respectfully submitted,

CAKE & CAKE,
JAUREGUY & TOOZE and
W. ELMER RAMSEY,
Solicitors for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit

SAMUEL EAGLE, JOHN WILLIAM
LANGS, and PLOMB TOOL COM-
PANY, a corporation,

Appellants,

vs.

P. & C. HAND FORGED TOOL COM-
PANY, a corporation,

Appellee.

Appellee's Brief

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE JAMES ALGER FEE, District Judge.

T. J. GEISLER,
Attorney for Appellee.

CAKE & CAKE,
JAUREGUY & TOOZE, and
W. ELMER RAMSEY,
Attorneys for Appellants.

FILED

AUG 24 1934

PAUL P. O'BRIEN,
CLERK

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vs.
P. & C. HAND FORGED TOOL COM-
PANY, a corporation,
Appellee.

Appellee's Brief

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE JAMES ALGER FEE, District Judge.

APPELLEE'S BRIEF

The patent sued on, issued to plaintiff, Samuel Eagle, June 7th, 1921 (Trans. 33), concerns a so-called Flex-Handled Wrench; probably so-called because

the head or socket-holding member is pivoted to the handle, so that it may be arranged at different angles with the shank, as convenient for the work to be done.

An earlier and similar type of Flex-Handled wrench is shown by the patent to Edmands, Number 820,185, issued May 8, 1906, (See Defendant's Exhibit D, Trans. 53, and the model of this wrench, Defendant's Exhibit AA, Trans. 96).

Plaintiff's patent has but one claim. If this claim were valid defendant's wrench would infringe.

The Patent Office failed to find the Edmands Patent in its examination of the prior art; also failed to cite several other very pertinent references. Nevertheless, even the prior art cited by the Patent Office restricted Eagle's patent to the single narrow claim which he accepted. It was the contention of the defendant in the District Court, and that Court so found, (Trans. 17) that the prior art is a complete anticipation of the alleged patentable combination purported to be described by Eagle's Patent and that his patent is therefore void.

In the first place let us examine the File Wrapper of Eagle's patent application, and consider the prior art therein cited.

Eagle's patent application initially contained four claims, three of which were in substance alike—hence it

will suffice to consider claim 1 and claim 4, which is the most specific of such initial claims: (See File Wrapper, pp. ~~731-7~~ in Supplemental Transcript of Record.) 175

CLAIM 1.

In a wrench, a head and a handle (1) pivotally secured to the head (4) to allow of swinging movement in a verticle plane.

CLAIM 4.

In a wrench, a head (4) having one end squared and the other end (6) rounded, a shank (3) spanning the rounded end of the head and pivotally connected thereto by a pivot pin (5), a handle (1) permanently secured to the shank and a spring pressed catch (8, 9) carried by the shank and riding the rounded end of the head and engageable with an indent (7) provided in the head.

(The numerals inserted after the elements of these claims are those employed by Eagle in his patent specification to identify the parts.)

The examiner of the Patent Office in his first action dated December 9, 1920 (see File Wrapper, pp. ~~731-10~~) Trans, cited the patent to Miottel, No. 1,169,987, dated February 1, 1916, being defendant's Exhibit G (Trans. 71); Patent to Mandeville, No. 348,565, dated September 7, 1886, being defendant's Exhibit C (Trans. 49) and the patent to Helstrom, No. 1,168,204, dated January 11, 1916, being defendant's Exhibit F (Trans. 65) and rejected all of said initial claims stating:

“Claims 1, 2 and 3 are rejected as failing to patentably distinguish from either Miottel or Mandeville, above cited. The elements B of Mandeville and 3 of Miottel are considered the equivalent of applicant’s member 4.

Claim 4 is rejected on Miottel in view of Helstrom, above cited. No invention would be involved in placing Helstrom’s member 30 in the member 2 of Miottel. * * *”

Eagle’s attorney, in response to said action canceled all the initial claims, and substituted two new claims numbered 1 and 2 (File Wrapper, pp. ~~731-11~~). 178

The first of these substituted claims read:

1. A wrench comprising a handle, (1) a socket support (4) pivotally secured thereto and a socket (10) open at both ends and adapted to slidably receive the socket support in one end thereof.

The second of such substituted claim it is convenient to consider in parallel relation with initial claim 4 of the Eagle application with each of such claims divided into its component elements, thus—

Initial claim 4 of Eagle application, rejected by Patent Office and cancelled.

In a wrench
a head (4) having one end squared and the other end rounded (6)

a shank spanning the rounded end of the head and pivotally connected thereto by a pivot pin (5)

a handle (1) permanently secured to the shank

and a spring pressed catch (8, 9) carried by the shank (3) and riding the rounded end of the head (4) and engageable with an indent provided in the head

Single claim of Eagle patent No. 1,380,643

A wrench comprising a handle (1) having a bifurcated shank (3)

a socket-support (4) having one end mounted and pivotally secured (5) between the branches of the shank bifurcations and the other end squared

a nut engaging socket (10) having a squared bore adapted to slidably receive the squared end of the socket support (4) therein

and means (8, 9) carried by the handle and engageable with the rounded end (6) of the socket support (4) to hold the latter in different positions

(The numerals inserted after the elements of these claims are those employed by Eagle in his patent specification to identify the parts.)

In submitting this amendment and substituted claims Eagle's attorney said:

“The two new claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end pivotally secured to the handle and the other end adapted to be slidably received in the bore of the nut engaging socket. With this construction applicant needs no fastening means for holding the socket support and the socket together depending merely upon the frictional engagement between the parts. The references also fail to disclose a socket support and socket assembled together and held against relative pivotal movement, the socket support being pivotally secured onto the handle and adapted to be held at various positions with respect thereto.”

In the further action of the Patent Office, dated January 13, 1921 (File Wrapper, ^{Trans 180} ~~page 13~~), the Examiner said:

“This case, as amended January 7, 1921, has been re-examined, and the following art is cited:

BALTZLEY, 1,209,658, December 26, 1916.

Claim 1 is rejected as failing to distinguish patentably from Baltzley. Patentee's member 12 constitutes a pivoted member equivalent to applicant's member 4. Member 10 is a socket open at both ends.

Claim 2 is allowable, as at present advised.”

The Eagle patent was thereupon issued with said substituted claim 2.

The new feature which distinguished this substituted claim from the prior art, as found by the Examiner, is the last italicized element of said claim.

But the Patent Office failed to cite all the pertinent prior patents as references, namely the said Edmands Patent (Trans. 53) which also shows “means carried by the handle and engageable with the rounded end of the member (b) to hold the latter in different positions”, for, as above mentioned, the Patent Office ruled that Eagle’s member 4 is considered the equivalent of elements B of Mandeville (patent) and 3 of Miottel (patent) to which ruling the Eagle’s attorney made no objection, and thus under the same ruling, *Edmands’ socket-member b is the full equivalent of Eagle’s socket-holding member 4.*

A further pertinent reference omitted by the Patent Office, was the Patent to Miller and Burg, No. 1,175,973, dated March 21, 1916 (Defendant’s Exhibit H, Trans. 75), which shows in parts 8, 13, and 15 means for holding a handle-section of a wrench movably engageable with another member of the wrench, in order to hold the latter in different positions; and further failed to cite the very pertinent patent to Fairchild, No. 1,292,285, dated January 21, 1919 (Defendant’s Exhibit J, Trans. 85; a model of which patent is Defendant’s Exhibit M, Trans. page 101), which patent shows a Socket Wrench provided with a pivoted male socket-holder 17 to which to attach a socket 42, for engaging a nut 43, as illustrated by Fig. 1 of the drawing of this

patent. The patent specification of this Fairchild patent states its object to be identical with that of the Eagle Patent, viz:

“It is the main and primary object of the present invention to improve the general construction of socket wrenches whereby to render them capable of greater range of use in restricted localities, and to simplify the same as far as possible in order to reduce wear in the working parts to a minimum, and thereby prolong the life of the wrench.”

Notwithstanding the very specific feature to which Eagle's patent claim is limited and the fact that this same feature is shown both in purpose and result by the Edmands Patent, plaintiff still contends that the Eagle Patent covers a patentable combination.

Let us now see on what this combination is based.

Plaintiff's witness, Pendleton, testified that the “special feature” of the Eagle wrench is that the part marked “4” in the patent is “pivoted to the handle (1)” and may be moved on its pivot laterally (Trans. 43).

By comparing the Eagle Patent (Trans. 33) with the prior Edmands Patent (Trans. 53) it will be seen that the handles of both wrenches terminate at one end in a fork, in which a piece is pivoted. Edmands' piece b is a socket adapted to receive the nut, while Eagle's piece 4 is a connecting element on which to affix the particular socket to be used. In purpose and mode of operation both wrenches are obviously the same.

As already stated, the Patent Office ruled that a socket like Edmands' piece b—a similar socket piece as B of Mandeville patent (Trans. 49) and socket piece 4 of Miottel patent (Trans. 71)—is the equivalent of Eagle's male connector 4.

Eagle was bound by his acceptance of such ruling of the Patent Office. *Broadway Towel Supply Co. v. Brown Meyer Co.*, 245 Fed. 659, 661.

Pendleton admitted "that it might be a *mechanical choice for convenience of operation*, to make the movable piece 4, which is the socket support of the Eagle wrench, either male or female; but to make such socket as a female connection would be a very impractical expedient." (Trans. 47.)

Mechanical choice or expediency, of course, means that the mechanic using a tool would adapt it so as to be best suited for the work to be done with it. Pendleton refers to such expedient as "impractical", because "to have a female end on this (Edmands') wrench would require an *adapter* or some other joint to again reduce the female end to a male end so that mechanics generally who are equipped with sockets of which there is a universal use would then have a male connector to put in" (Trans. 46).

The "*adapter*" to which Pendleton referred as necessary to be used with the Edmands wrench, in order to use it in the same manner as the Eagle wrench, is a de-

vice which was common to the art when Eagle entered the field with his alleged improvement. Adapters were provided so as to permit the use of different makes of sockets with different makes of wrench handles. The catalogue published by the plaintiff Plomb Tool Company shows on pages 18 and 28 (Defendant's Exhibit Q, Trans. 121), different types of adapters, which, as said catalogue states, the Plomb Tool Company furnishes "to enable Plomb sockets to be used with handles of other makes, or Plomb handles with other sockets." A standard socket, plaintiff's witness, Buhler, said is "a round" socket with a hole through both ends (Trans. 149). See the samples of sockets constituting part of defendant's Interrogatory Exhibits A and B (Trans. 120) and the photograph of such Exhibit shown in defendant's Exhibit R (Trans. 153).

On Page 18 of said catalogue of the Plomb Tool Company is shown (first cut from the left) a "double male adapter" (Trans. 121). The adapters shown on said Page 18, are, "identical" with those shown on Page 28 "with the addition of one part of different type * * * the double male feature." Plomb Tool Company's "double male" adapter could be used in connection with Edmands' wrench. Such use was just what the Plomb Tool Company purposely provided for; and it is self-suggesting to any mechanic.

Buhler, one of plaintiff's expert witnesses criticised the Edmands Wrench because the socket piece b was made removable, so that it may be substituted by an-

other socket. Buhler's criticism about such construction was that the socket (b) might "drop off" when using the wrench in certain positions (Trans. 149); and Buhler further ventured to inform the Court that "just to take that piece off and replace that, and hinge permanently in place a male socket holder" was such a job as 'an ordinary mechanic' could not do if asked to do so." (Trans. 150.)

Shim, an expert mechanic, called by defendant (Trans. 107), being asked to express his opinion on any comparative advantage which he saw over the Edmands prior art, testified he could not find any advantage either in use or construction in the Eagle patent over the Edmands patent.

He was further asked:

"Q. Now just look at the Fairchild patent, defendant's Exhibit J, and the model of the same, defendant's Exhibit M. Now with the Fairchild patent before you and the Edmands patent before you, would you find, as a mechanic, any difficulty in providing in a wrench a socket support, a male socket support or square head, as they call it, as a means for holding that socket support in different angular positions with respect to the nut?

A. No trouble whatsoever.

Q. What would you think of a mechanic who found difficulty in making such a wrench?

A. I wouldn't call him a mechanic."

Plaintiff seemed to be averse to going into further details about the differences in construction and result between the earlier Edmands' patent and plaintiff's patent. When the defendant endeavored to inquire into this matter the plaintiff objected (Trans. 47 and 140).

Pendleton, finally summing up all the advantages which the Eagle wrench had over Edmands' wrench and other devices in the prior art, said (Trans. 155):

“Q. What, in your opinion, is the main advantage of the Eagle wrench over the references cited by the defendant as prior art? Can you say that in a few words, what advantages?”

A. The chief advantages are twofold. One is that the Eagle wrench is a one-handed wrench, and second, that the Eagle wrench is designed to be used with the usual standard sockets in possession of the trade.”

The “one-handed feature” referred to by the witness is the pivoting of the male connector 4 of the Eagle wrench permanently in the bifurcated end 3 of the handle (see Eagle Patent, Trans. 33). Such feature is, however, illustrated by the prior socket wrench described by the Fairchild patent, defendant's Exhibit J, overlooked by the Patent Office (Trans. 85; and see defendant's Exhibit M, a model of this patent, Trans. Page 101).

Fairchild shows in Fig. 1 of his patent drawing a pivoted male socket holder 17 to which to attach a

socket 42 for engaging a nut 43. The patent specification of Fairchild (page 1, line 15) states its object to be identical with that of the Eagle patent.

The providing of a wrench adapted for the use of standard sockets was an old idea as apparent from, and taught by the advertisement in the Plomb Tool Company's own catalogue as above mentioned.

That Eagle was charged with knowledge of the prior art is an elementary rule in patent law, *Mast Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 493.

The narrow, illogical ground on which plaintiffs finally would sustain the Eagle patent is brought out by plaintiffs' comparison of defendant's two Interrogatory Exhibits "A" and "B", duly introduced in evidence (Trans. 120).

In connection with these exhibits defendant's counsel put the following question to the plaintiffs:

"Before defendant rests, I desire to have plaintiffs advise defendant as to plaintiffs' position on the question of infringement. Referring to defendant's Interrogatory Exhibit 'A', this is made with a male plug to receive a socket on it. Defendant's Interrogatory Exhibit 'B' is made with a female wrench receiving part. The only difference between the two exhibits is the substitution of a female wrench-engaging part for a male wrench-engaging part. I call attention to the ruling of the Patent Office which occurs on page 10

of the file-wrapper, defendant's Exhibit 'L', Paper No. 2 (See Supple. Trans.). The Examiner stated that the element B of the Mandeville patent, defendant's Exhibit 'C', and the element 3 of the Miottel patent, defendant's Exhibit 'G', are considered the equivalent of member 4 of the Eagle wrench. I want to know whether the failure by plaintiffs to introduce a wrench of the type of defendant's Interrogatory Exhibit 'B' was because no infringement is claimed on that type of wrench.

“MR. RAMSEY: It is plaintiffs' contention that the handle and the female head shown in defendant's Interrogatory Exhibit 'B' is not the equivalent, and is not claimed to be an infringement of the Eagle patent. However, when that has been modified by a coupler or adapter so that the wrench has a male head and can be used in combination with a common socket, then it approaches the plaintiffs' patent; and if this Court holds that this patent is entitled to broad interpretation, *plaintiffs claim that defendant's Interrogatory Exhibit 'B' when used with an adapter infringes the Eagle patent.* If, however, the Court considers the Eagle patent to have a narrow interpretation, we wish the Eagle patent to be so limited.”

Defendant introduced as defendant's Exhibit “P” an “Adapter” which can be used with defendant's Interrogatory Exhibit “B”. (Trans. 123.)

Plaintiffs would thus reopen for review the finding of the Patent Office that a socket or female nut-engag-

ing element, such as shown by Edmands patent, is equivalent of Eagle's male nut-engaging element. Such discussion being closed, plaintiffs' contention is, in effect, an admission that the Edmands patent shows a complete anticipation of Eagle's patent claim.

For, that which infringes if later than the patent anticipates if earlier. *Knapp v. Morss*, 150 U. S. 221, 228.

Much ado was made about the fact that while the Edmands patent was issued in 1906, this type of Flex-Handled wrench did not go into *extensive use* until the Eagle wrench was put on the market. But this is readily explained. The Flex-Handled wrench is essentially an auto-mechanics' wrench and it grew with the auto industry. (Trans. 37.)

As Carlborg, plaintiff's witness said "There were places on the motors and chassis of the car that required a wrench of special design, because there were places hard to get at." (Trans. 137.)

And besides, *the Plomb Tool Company spent "between \$10,000.00 and \$12,000.00 in exploiting" the Eagle wrench.* (Trans. 44.)

Judge Fee in his opinion (Trans. 161) in considering "what novelty the Patent Office believed the (allowed) claim covered" said:

“* * * Probably the feature of permitting the socket head to be held in different positions is the differentiating factor. At all events it seems perfectly clear that if the (patent) office had discovered the Edmands Patent (1906) for a like wrench, the patent in suit would not have issued. * * * * Hoe Company v. Goss Press Co., 30 Fed. (2d) 271, 274. * * * The Edmands Patent has the same features except that the socket support and the socket itself are in one piece and are adapted to be removed from the pivot pin when the eye is opposite to one edge of the lug.

“It is perfectly obvious that when the wrench is being used to remove a nut the functions performed by each member are the same, and the parts are functionally equivalent. The same operation is performed by each in the same way and by the same means. The socket engages and holds the nut for the turning operation, the socket support actuated by the handle turns the socket, the handle is the means by which the twisting force is applied, through the bifurcated shank, and the latter prevents relatively pivotal movement. Likewise the means carried by the handle and engageable with the socket support hold the latter in different positions.

“It may be objected that the socket and socket support are mounted together, but that cannot affect the fact that for its useful purpose the functional effect is the same. The relation of the parts to one another is the same functionally in each tool.

“On the other hand the methods of attachment if new in the art might themselves constitute invention. It is clear enough that the eye placed upon the lug to make it removable by Edmands, was not essential to holding the socket head in various posi-

tions, and could have readily been dispensed with if it had been desired only to perform that function. Furthermore, any mechanic instructed to make the head irremovable would have simply closed the gap and the function for the device for holding the head in various positions would have been as efficient as that upon the Eagle patent. No novelty can be found in this feature.

“Considering the squared end for mounting the now standard sockets, it has been noted that the Patent Office holds interchangeable as an old device a squared male and a recessed female member. In the Fairchild Patent (1919) which was not cited, there appears as accessory to a ratchet wrench, a male plug or head slidably mounted in a socket. The same result can be obtained with an adapter, which is a device old in the art and permits a change of female member into a male part. Therefore patentability cannot be claimed for this feature. Citing authorities. * * *

“When one looks at the Edmands Patent and considers the extensive use to which the standard sockets had been placed before plaintiff’s patent was applied for, it is inconceivable that anyone, whether mechanical or not, if informed of the need of adapting the patented device to the use of the standard socket, could not have evolved the Eagle patent.

“It is insisted that because of the extended use which the device manufactured by the Plomb Tool Company has received, this court is bound to find invention therein. But where the element of invention is lacking, widespread use will not prevail to support a patent. *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, 542. ‘The fact that the patented device has gone into general use, while evidence of

its utility, is not conclusive of its patentable novelty.
 * * * A patent must combine utility, novelty and invention. It may embrace utility and novelty in high degree and still be only the result of mechanical skill as distinguished from invention.’ Klein vs. City of Seattle, 77 Fed. 200, 204.

“The patent laws are for the purpose of fostering invention, and when that element is found it is right and proper that the fruits thereof be protected. But it would be unfair and unjust to permit one by a clever combination of devices old in the art and which already belong to the public, to monopolize a field and take from the people at large what already belongs to them.

“The patent in suit is declared invalid.”

ARGUMENT AND AUTHORITIES.

The opinion of the District Court, the result of painstaking consideration of plaintiffs'-appellants' contentions, covers fully the facts and the law of this case as evident.

As pointed out in Judge Fee's opinion, Edmands' Patent shows a "Flex-handled" wrench, and the "means carried by the handle and engageable with the rounded end of the socket support to hold the latter in different positions"—the only feature in Eagle's wrench which the Examiner of the Patent office found as distinguishable from the prior art which he cited—is unquestionably found in the Edmands patent, while the providing of a male-connector on which to fasten a socket is

unquestionably found in the Fairchild Patent (Trans. 85). Fairchild's patent specification states, Page 2, line 89—

“The herein described wrench is designed for use with an assortment of sockets one of which is illustrated in Fig. 1 and designated by the numeral 42”; and on the same page, at line 114 states—

“By the construction described the shank 10 may stand in relation to the engaging head as in Fig. 1, in which position it is in alinement therewith, or it may be swung at right angles thereto, or it may be moved in any position intermediate of the two described, as illustrated in Fig. 3.”

A construction mechanic with the Edmands and Fairchild patents before him, as the law presumes (Mast v. Stover Manufacturing Co., 177 U. S. 485, 493) certainly would have no difficulty in modifying the Edmands wrench by substituting a male socket-connector in place of his socket, a mere “*mechanical choice for convenience of operation*” as plaintiffs' own expert witness, Pendleton, admitted. (Trans. 47.)

In Knapp v. Morss, 150 U. S. 221, 228, the Court said—

* * * “The validity of the patent in question must be ascertained, not from a consideration of the purposes sought to be accomplished, but of the *means pointed out* for the attainment thereof, and if such means, adapted to effect the desired results, do not involve invention,

they can derive no aid or support from the end which was sought to be secured. All that Hall did was to adapt the application of old devices to a new use, and this involved hardly more than mechanical skill. * * * “The same device employed by him (the patentee) existed in earlier patents; all that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application’.”

It is elementary that it is immaterial in a patentable combination that all the elements are old per se. Such elementary rule is recognized in Judge Fee’s opinion. But only such combination as produces *a new result attributable to the association of the parts*, and not a mere summation of the results individually contributed by the elements, *is patentable*.

“No one by bringing together several old devices without producing a new and useful result, the *joint* product of the elements of the combination and *something more than an aggregate of old results*, can acquire a right to prevent others from using the same devices either singly or in combination. * * * ”

Grinnell Machine Company v. Johnson Company,
247 U. S. 426, 432.

It is not necessary that all the elements of a claim be found in a single patent. Dilg v. Geo. Dorgfeld & Co., 189 Fed. 588, 590; CCA 2d; Keene v. New Idea

Spreader Co., 231 Fed. 701, 708; CCA 6th (Cited by Judge Fee).

“The union of selected elements from various sources in a patented structure may be an improvement upon anything the art contains, but if, in combining them, no novel idea is developed, there is no patentable invention, however great the improvement may be.”

Turner v. Lauter Piano Co., 248 Fed. 930, 938; CCA 3d.

“There is no invention in merely selecting and assembling * * * the most desirable parts of different mechanisms in the same art where each operates in the same way in the new device as it would in the old and effects the same results.”

Elite Mfg. Co. v. Ashland Mfg. Company, 235 Fed. 893, 895; CCA 6th Cir.

Two of the most pertinent patents, Edmands (Trans. 53) and Fairchild (Trans. 85, reproduced in Defendant's Model Exhibits AA and N) as pointed out in Judge Fee's opinion (Trans. 161, 163) show the alleged novel features of Eagle's wrench.

Eagle was charged with knowledge of these patents regardless whether he had actual knowledge of them or not, as Judge Fee said, citing Mast Co. v. Stover Mfg. Co., 177 U. S. 485, 493.

“Authorities concur that *the substantial equivalent of a thing*, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substan-

tially the same result, they are the same, even though they differ in name, form, or shape.”

Machine Company v. Murphy, 97 U. S. 120, 125, last paragraph.

“Invention can not be satisfactorily defined, * * * but *Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do not involve invention.*”

McClain v. Ortmyer, 141 U. S. 419, 427.

The basic principle in patent law is that the mere exercise of mechanical skill is not invention.

“It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception (citations). *A mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention.* (Citing Smith v. Nichols, 21 Wall. (U. S.) 112, 118, 119.) *Neither is it invention to combine old devices into a new article without producing any new mode of operation * * * . It is not enough that a thing shall be new in the sense that the shape or form in which it is produced shall not have been before known, and that it shall be useful, but it must * * * amount to invention or discovery.*”

Burt v. Evory, 133 U. S. 349, 358.

Electric Cable Joint Co. v. Brooklyn Edison Co., Inc., (1934) 54 U. S. Supr. Ct. Advance Sheets No. 11, P. 586.

“The mental faculties employed in the inventive act are the creative, not the imitative faculties. * * * *Industry in exploring the discoveries and acquiring the ideas of others; wise judgment in selection and combining them; * * * none of these are creation, none of these enter into the inventive act.*”

1 Robinson on Patents, Section 78.

“In the contemplation of the patent law not only any way which has already been employed, but also any way so like some previous way that it must be presumed to be within the mental reach of any one skilled in the art or trade wherein it belongs, is not the subject of patent.”

Merwin on Patentability of Inventions, page 12.

“The process of development in manufacture creates a constant demand for new appliances, which the skill of the ordinary head workman and engineer is generally adequate to devise * * * . *To grant a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in consequence.*”

Atlantic Works v. Brady, 107 U. S. 192, 199.

“Old devices frequently require alteration or modification to apply them to uses for which they are not

originally designed or adapted, and when the Court is satisfied that the changes require only the exercise of the skilled mechanic, the presumption of patentability running with the allowance of the patent is overcome.”

Cordley v. Richardson Corp., 278 Fed. 683, 685 (D. C. N. Y.)

“A new and analogous use of an old thing is not invention even though it effects results not before contemplated.” E. I. Dupont v. Glidden, 1 Fed. Supp. 1007, 1011. Howe Machine Co. v. National Needle Co., 134 U. S. 388, 397; St. Germaine v. Brunswick, 135 U. S. 227, 230, cited by Judge Fee in his opinion, Trans. 163.

Since in the case at bar, the File Wrapper shows, the Patent Office did *not* go fully into the prior art, indeed, *overlooked very pertinent prior patents*, the presumption of the validity of the patent is to that extent overcome and destroyed.

Dennis v. G. N. Railway, 51 Fed. (2d) 796 (D. C. Wash.). Webster, D. J., citing several cases. Westinghouse Co. v. Toledo Co., 172 Fed. 371, 372 (CCA 6th).

Hoe Co. v. Goss Press Co., 30 Fed. (2d) 271, 274 (CCA 2d).

The burden thus rested upon plaintiffs, to establish the patentable novelty in Eagle's patent.

The plaintiffs instead of carrying this burden not only *failed to introduce such proof, but purposely, studiously, avoided entering upon the investigation of that subject*; even thwarted any attempt on the part of defendant to pursue such investigation. (See Trans. p. 47 and p. 140.)

The large number of wrenches sold by the Plomb Tool Company has no bearing on the validity of Eagle's patent. The \$10,000 to \$12,000 spent by the Plomb Tool Company no doubt had a potential effect in enhancing its sales.

When doubt exists on the question of invention, extensive purchase by the public may turn the scale, but as Judge Fee remarked, that principle has no application in the instant case, citing *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 542.

And the Court of Appeals of this Circuit said in *Klein v. The City of Seattle*, 77 Fed. 200, 204—

“The fact that the patented device has gone into general use while evidence of its utility is not conclusive of its patentable novelty. * * * A patent must combine utility, novelty and invention. It may embrace utility and novelty in high degree, and still be only the result of mechanical skill as distinguished from invention.”

The case at bar is an instance of the misuse of our patent laws so vigorously condemned in the familiar

case of *Brady v. Atlantic Works*, 107 U. S. 192, 200, referred to by Judge Fee in his opinion, in which the Court said (page 200) :

“The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to law suits and vexatious accountings for profits made in good faith.”

* * * * *

The decree of the District Court was right and should be affirmed.

Respectfully submitted,

THEODORE J. GEISLER,

Attorney for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit

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and PLOMB TOOL COMPANY, a corporation,
Appellants,

vs.

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a corporation,
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Appellants' Reply Brief

Upon Appeal from the United States District
Court for the District of Oregon

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Solicitor for Appellee

Appellee Deliberately Copied the Eagle Wrench

Before proceeding to a consideration of the points made by appellee in its brief, it must be remembered that appellee is a deliberate infringer of appellant's patent. When it entered into the manufacture and sale

of flex-handled wrenches it copied the Eagle wrench. This is testified to by C. F. Carlborg who was then a partner and later vice-president of appellee and in charge of the shop end of appellee's business. (T. 124)

The statement that it was appellee's deliberate intention to copy is thus not based upon mere conjecture but is established by the admission of said officer. No attempt was made by appellee to explain said testimony or to refute it in any manner and thus it stands admitted on the record.

A comparative inspection of the wrenches clearly discloses that appellee deliberately chose slavishly to imitate the Eagle wrench in all of its details including color and external appearance, as well as the exact operating parts thereof. Appellants' attorney notified appellee of said infringement and instead of discontinuing said infringement appellee has engaged in expensive litigation to defend the imitation. Appellee has also attempted to improve or modify said wrench and thought enough of said modification to obtain a patent thereon (T. 129). But even though it has a patent monopoly upon said modification, appellee still continues to manufacture the Eagle wrench but yet contends herein, as a defense, that the details of the Eagle wrench are unimportant and constitute mere matters of choice.

Appellee's Defense is Technical

Appellee's entire defense is based upon the fact that appellee has searched the patent records and has discovered two wrenches patented prior to the Eagle

patent which wrenches, denominated the Edmands wrench (Pl. Ex. "D") and the Fairchild wrench (Pl. Ex. "J"), have some elements which are common to parts of the Eagle patented wrench. Because it has found said two patents, appellee presumes that the Examiner in charge of the application possibly overlooked them because he did not make them of record and that if he had considered them the single claim might not have been allowed. Appellee also contends that if a mechanic skilled in the art had said patents before him, said mechanic would perceive and conceive the answer to the troublesome problem of providing a multi-purpose, flex-handled wrench adapted to use standard sockets and that said mental concept would be self-suggestive.

Appellee's Defense is Theoretical and Does Not Follow the Experience of the Parties and the Art in General

The defense of lack of invention is based not upon the **experience** of any of their witnesses or upon the **experience** of appellee itself. It is a mere **theoretical conclusion which is entirely opposed to the experience of the art**. The various witnesses have testified that the art was eagerly looking for a wrench which would solve difficulties experienced by everyone interested in the art. Manufacturers, and mechanics as well, had their selfish reasons for attempting to solve this problem but all were unsuccessful. When Eagle solved the problem and brought his solution forward it was immediately recognized as the proper one, was seized upon, and adopted by the art, and was given such almost

universal recognition that the sale of Eagle wrenches now constitutes substantially one-half of the wrench business of the various manufacturers. No attempt is made by appellee to explain this phenomenal success experienced by itself as well as by all of the other manufacturers, except to point out that the Plomb Tool Co., one of the appellants herein, spent between ten and twelve thousand dollars in exploiting the Eagle wrench over a period of several years. It was not shown that this sum of money was an unusual expenditure and obviously it had no bearing upon the sales made by appellee and other competing manufacturers who have infringed the Eagle patent, except that they would profit unfairly from a competitor's efforts.

Appellee Gives the "Tribute of Praise to the Prior Art; It Gives the Tribute of Its Imitation to the Eagle Patent"

Appellee contends that the Edmands wrench will "do anything that the Eagle wrench will do" and relies upon said contention so strongly that its entire defense is based upon said premise. When appellee entered the field of manufacturing wrenches the Edmands wrench, which it now extols as a superior wrench, was public property. Appellee could have adopted said wrench without restriction and still can if it cares to do so. It can take advantage of its structure, which appellee contends to be more efficient and less expensive and, if this were so, could undersell appellants if it wished to do so. Appellee's actions, however, belie its contentions brought forward as a defense in this suit. It gives

the "tribute of its praise to the prior art; it gives the tribute of its imitation, as others have done, to the (Eagle) patent." Appellee contends that the single claim in the Eagle patent is narrow and this would seem to make the legal evasion easy.

"Why then was there not evasion by a variation of the details of the patented arrangements? Business interest urged to it as much as to infringement. We can find no answer except that given by the XXX Company: The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary!" **Diamond Rubber Company vs. Consolidated Tire Co.** 220 U. S. 418; 55 L. Ed. 527, 534.

As is stated in appellant's brief (page 77) it is submitted that THE ART IS NEVER ADVANCED BY THE IMPLIED SANCTIONING OF DELIBERATE PIRACY WHERE THE ONLY REASON ADVANCED FOR SAID TAKING IS THAT ANYONE COULD HAVE DONE AS WELL IF HE HAD THOUGHT OF DOING IT.

The Edmands and Fairchild Patents are Not Better References: They are Only Different References

Instead of meeting these issues, appellee has set up a very technical defense, namely: that there are two patents that were issued prior to the Eagle patent which are not referred to by the Examiner in his actions on the application which matured in the Eagle

patent; that it might be presumed that the Examiner did not see and consider said patents; and that if the Examiner had seen these patents it is possible that he might not have allowed the Eagle claim.

Appellee, in its brief, does not point out in what respects the Edmands patent differs from the patent references cited by the Examiner, nor does appellee point out in what respect the Fairchild patent differs from said references. It merely contends that these are **different** references and, therefore, some substantial weight should be given to their omission from the file wrapper and that the omission of said references should affect the presumption of validity enjoyed by appellant's patent because of the issuance thereof by the patent office.

IT SHOULD BE NOTED FURTHER THAT NEITHER THE EDMANDS WRENCH OR THE FAIRCHILD WRENCH HAS EVER BEEN MANUFACTURED AND THE PATENTS ARE THUS PAPER PATENTS WHICH, FROM A PRACTICAL STANDPOINT, HAVE BEEN IGNORED BY THE ART.

It is not essential that the United States patent office in making its actions shall cite **all** of the examples of the prior art because said prior art might involve hundreds of prior patents and practical examples. The rules of practice of the United States patent office (Rule 66) require that "Upon the rejection of an application for want of novelty the examiner must cite the **best** references at his command." To have any per-

suasive value whatsoever, it is necessary to demonstrate that the references not cited by the examiner are better references in order to weaken the presumption that the Examiner has given an application for patent his careful attention.

Appellee's Defense Does Not Meet Issues but Involves Only Presumptions Based Upon Possibilities

In this case the File Wrapper discloses that Eagle as an applicant presented many different claims to the Patent Office Examiner. The Examiner considered each of the claims thoroughly and rejected all but one of said claims. It was only after a careful examination that he permitted said claim to be allowed. This careful attention given to the application by the Examiner **strengthens** the presumption of its validity rather than **weakens it**.

It appears to be appellee's contentions that the court should first construe the allowed claim to have substantially the same scope as rejected initial claim 4 which appellee has compared side by side on page five of its brief, then should hold that said claim and said construction are anticipated by Edmands in view of Fairchild. The Examiner on the other hand has held that said initial claim 4 was anticipated by Miottel in view of Helstrom. It is submitted that the Examiner carefully considered **exactly the same point which appellee now urges**. It is obviously unnecessary and highly improper to put a strained, distorted interpretation upon the single claim allowed in the Eagle patent.

Said claim is clear and needs no construction other than the one proposed by the patentee in his specification and in the remarks accompanying the claims when they were presented to the Patent Office for consideration.

Appellee's Defense Involves a Strained, Rather than a Natural Interpretation of the Eagle Claim

In addition to soliciting the court to place this strained construction on the Eagle claim, appellee contends that "The only new feature found by the patent office in the Eagle wrench over the prior art cited was Eagle's spring bolt 8 for holding the piece 4 in different positions." This sentence is the initial statement in that portion of appellee's brief termed Topical Index of Dominating Facts. In addition appellee summarized this contention in slightly different words on page 7 as follows: "The new feature which distinguished this substituted claim from the prior art, as found by the Examiner, is the last italicized element of said claim."

THE CONCLUSION THUS ARRIVED AT IS NOT BASED UPON ANYTHING IN THE RECORD OR IN THE FILE WRAPPER. IT IS A CONCLUSION DRAWN BY APPELLEE TO SUIT ITS PARTICULAR DEFENSE AND APPELLANT CHALLENGES APPELLEE TO POINT OUT ANY FINDING BY THE EXAMINER TO THIS EFFECT. IT IS OBVIOUS THAT IF IT IS NOT THE PATENT OFFICE'S HOLDING, THE ENTIRE DEFENSE FALLS WITH ITS MAJOR PREMISE.

Appellee's own brief points out the fallacy of said contention as clearly as possible. The argument of Eagle when presenting the allowed claim points out the differences of the claimed structures over the prior art cited by the Examiner. **Said statement is just as pertinent with respect to Edmands and Fairchild as it is with respect to Miottel, Helstrom, and the other references cited by the Examiner.** The contention of Eagle as an applicant is as follows:

“The two new claims now presented for consideration are thought to be allowable, inasmuch as none of the references show a socket support in the form of a solid body having one end **pivotaly secured** to the handle and the other end adapted **to be slidably received in the bore of the nut engaging socket.** With this construction applicant needs no fastening means for holding the socket support and the socket together depending merely upon the frictional engagement between the parts. The references also fail to disclose **a socket support and socket assembled together and held against relative pivotal movement, the socket support being pivotaly secured onto the handle** and adapted to be held at various positions with respect thereto.”

Appellee's contention that the novelty of the entire combination is based upon the novelty of the last paragraph italicized on page five of its brief is obviously an erroneous conclusion, as can be further demonstrated by an examination of the two claims noted on

said page five. The last paragraph in each of said two claims are almost element for element the same. In fact, even the wording of said last paragraphs including said elements, is similar.

In initial claim 4 elements 8 and 9 are termed "a spring pressed catch carried by the shank." In the allowed claim said elements are termed "means carried by the handle." Appellee finds no difficulty in noting that said parts are exactly the same, because it has given them the same reference characters to fix their identity. In claim 4, the operative relation of said parts is described as "riding the rounded end of the head and engagable with an indent provided in the head." In the allowed claim the operative arrangement is described as "engagable with the rounded end of the socket support to hold the latter in different positions." In these statements of operative relation, appellee has also evidenced no difficulty because it was able to identify said parts with the same reference numerals.

It is difficult to conceive how appellee can cite all of this material and then offer to this court its conclusion that "the new feature which distinguished this substituted claim from the prior art as found by the Examiner is the last italicized element of said claims." **It seems clear that the novelty of the combination is based upon the inclusion in the combination of the elements set out in the second and third paragraphs of said allowed claim, as noted in appellee's brief, and as has been pointed out in**

appellant's brief. The inclusion of said elements gives the combination an entirely different mode of operation and an entirely new result. INSTEAD OF PROVIDING MERELY A HANDLE WITH A SERIES OF REMOVABLE HEADS, IT PROVIDES A HANDLE WITH A SOCKET SUPPORT PIVOTALLY SECURED TO SAID HANDLE AND ADAPTED TO BE SLIDABLY ENGAGED BY ONE OF A SERIES OF REMOVABLE STANDARD SOCKETS, THE SOCKET SUPPORT BEING HELD IN ANY OF A NUMBER OF POSITIONS SO THAT IT WILL BE A ONE-HANDED WRENCH.

Appellee's Defense Opposed to Rule Announced in Doble vs. Pelton

Even if appellee's contentions were correct, that the novelty of the entire combination is based upon the novelty of the last paragraph, it would be improper to so establish patentable novelty for the entire combination. It is well established, in this circuit at least, that this is an improper test for invention of a combination. Judge Van Fleet in **Doble vs. Pelton** 186 Fed. 526 said:

“It is well established you cannot construe a patent for a combination, such as this, with reference to novelty as to any distinct separate feature; for that purpose the device is to be judged as a unit, and it is to be determined from its unitary action whether it is a valuable combination or whether a mere aggregation. You cannot take it piece meal and finding that its various elements have been anticipated in different devices of the

prior art, none of which, however, cover all of the elements which are to be found in the combination, and thereby successfully sustain a defense of anticipation. You must find all the elements of the combination or their equivalents in some particular device which is claimed to be an anticipation."

The Examiner's Comments do Not Have the Effect of Findings and in this Case do Not Even Support Appellee's Contentions

The next point raised by appellee and italicized on page 7 is that Edmands' socket member b is the full equivalent of Eagle's socket member 4. This contention is based upon the fact that in **other claims** embodying **other and different combinations** the Examiner held **other** elements in **different** patents were equivalent to member 4 in the Eagle patent.

A similar question was raised by a defendant in the case of **Stetson vs. Snook-Roentgen Mfg. Co.**, 245 F. 654, 656:

"A discussion of questions in the Patent Office in relation to a pending application, as bearing on the construction of the patent later issued therein, must be read in the light of the grounds of the discussion. To detach isolated statements from their setting and ignore the occasion and question that caused their use, generally leads to a mistake."

Appellee seemingly studiously ignores a similar holding that in Baltzley member 12 constitutes a pivoted member equivalent to applicant's number 4

and number 10 is open at both ends. (File Wrapper, page 13, Appellee's Brief, page 6.) This holding is made by the Examiner in connection with substituted claim 1. If there is any persuasive value in the Examiner's comment with regard to equivalency and rejection of **other and different** claims, it is submitted that the rejection of substituted claim one, which accompanied the allowed claim, has greater persuasive value than the holdings upon other different combinations. The said holding, with regard to substituted claim one, brings into bold relief the difference between the rejected matter and the allowed matter. In substituted claim one the combination does not include a socket support having one end pivotly secured between the branches of the shank bifurcation and the other end squared and having a nut engaging socket with a squared bore adapted to slidably receive the squared end of the socket support therein and provided with means for holding said socket support in different positions. The Examiner, by implication, has drawn a distinction between the combinations set out in said substituted claims. In substituted claim one the parts are equivalent because there is no new result produced by the combination. WITH REGARD TO SUBSTITUTED CLAIM 2, WHICH HE ALLOWED, A DIFFERENT HOLDING WAS MADE; NAMELY, THAT SAID PARTS DO NOT CONSTITUTE EQUIVALENT PARTS, AND DEFINE A PATENTABLE COMBINATION.

McClain vs. Ortmayer Case

Basing its argument upon said distorted premises,

appellee has misquoted the well-known case of **McClain vs. Ortmayer** (141 U. S. 419, 427) although said case is entirely opposed to said contention. On page 22 of appellee's brief, an excerpt from said opinion would seemingly state that "certain variations **do not involve invention.**" The court in its opinion in that case holds that questions of invention can not be tested by general definitions. The exact quotation from said case is as follows:

"Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices **do or do not** involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition."

There is no Admission of Equivalency Made by Mr. Pendleton

On page 9 of its brief, appellee has made much of an alleged admission on the part of appellant Plomb Tool Company's general manager. In setting out the testimony in narrative form to comply with the rules, sometimes the pertinence of a bit of testimony is lost. Appellant is therefore quoting from the certified copy of the testimony from which the transcript of record was prepared. (Testimony page 25, Transcript 47).

RE CROSS EXAMINATION—

Questions by Mr. Geisler:

Isn't it a mere mechanical expediency whether

you would make that moveable piece (4) of the Eagle wrench male or female, a mechanical choice, choice for convenience of operation.

A. It would—to make this female instead of male might be a mechanical choice, but it would be a very impractical one.

Q. Substituting one for the other is merely a mechanical selection?

A Combination Must be Disclosed Exactly or Equivalently to Constitute an Anticipation; Anticipation is Not Made Out by Showing that the Elements of a Combination are Old Per Se

Appellee has cited the case of **Keene vs. New Idea Spreader Company** (231 Fed. 701, 708) which was decided in the 6th Circuit as being authority for the statement that all of the elements of a claim need not necessarily be found in a single patent. The citation from said case might be good law in said 6th Circuit to enable a defendant to build up a “synthetic” reference from a number of different references and argue that inasmuch as all of the elements are old then the combination is old. It is entirely and exactly opposed to the rule in this Circuit, however, as set out **Doble vs. Pelton** (*supra*), in which Judge Van Fleet said:

“It is well established you cannot construe a patent for a combination, such as this, with reference to novelty as to any distinct separate feature; for that purpose the device is to be judged as a

unit, and it is to be determined from its unitary action whether it is a valuable combination or whether a mere aggregation. You cannot take it piece meal and finding that its various elements have been anticipated in different devices of the prior art, none of which, however, cover all of the elements which are to be found in the combination, and thereby successfully sustain a defense of anticipation. You must find all the elements of the combination or their equivalents in some particular device which is claimed to be an anticipation.”

It is submitted that this opinion by Judge Van Fleet states the general rule and follows the fact that you can take any machine apart and find that it is built up of bolts, nuts, castings, rods, and similar elements which in themselves are old. It is only when these parts are put together in a new and useful manner that a new machine is produced. It is of no persuasive value that the parts of a given machine, tool, device, or article of manufacture may be found in the same or analagous art in different combinations, producing different results.

An Issued Patent Carries with it the Presumption of Validity

As has been pointed out, the presumption of validity of the Eagle patent is not weakened or strengthened by the Examiner's failure to cite **all** of the prior art. The file wrapper shows that the Examiner made several very severe, careful actions, rejecting all of the original claims and rejecting one of the two substituted claims. He drew a very clear distinction between the rejected

substituted claim 1 and the allowed substituted claim 2. This therefore is not a case where a claim was allowed due to inadvertence, inexperience, or neglect.

Appellee cites three cases, the first of which holds that the presumption is **weakened** if better references are not made a record. The second holds that it **affects** the presumption and the third relates to the failure of an examiner to make said references of record only by inference. The pertinent portions of said three citations are as follows:

“We are not unmindful of the presumption of validity arising out of the issuing of the patent. This presumption, however, is a rebuttable, not a conclusive one, and, in this case, is materially weakened by the fact that the Simplon publications were not called to the attention of the patent authorities while the Dennis application was pending and being considered.”

Dennis vs. G. N. Railway, 51 F. (2nd) 796, 800.

“It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the Examiner in the Patent Office and were overlooked by him. This circumstance affects the presumption in favor of the validity of the patent from its issuance.”

Westinghouse Co. vs. Toledo Co., 172 F. 361, 392.

“Moreover, we are not faced with the presumption of validity in this respect because of the

Examiner's failure to find Gally as a reference; it is at least open to doubt whether, had Gally been discovered, the claims would have issued."

Hoe Co. vs. Goss Press Co., 30 F. (2nd) 271, 274.

None of these references, however, go so far as to serve as a basis for appellee's contention that "the presumption of the validity of the patent is to that extent overcome and destroyed." Much less do said opinions hold that "The burden thus rests upon plaintiff to establish the patentable novelty in Eagle's patent."

Appellee was Given Full Opportunity to Develop the Prior Art, but After Court's Ruling Failed or Refused to do so

It is difficult to understand how appellee can urge that plaintiffs studiously avoided entering into an investigation of the subject of the differences between the patented structure of the Eagle wrench and the references of record as supplemented by those stated by appellee, defendants below. Defendant was permitted to examine its witnesses with regard to said prior art without objection. The objections interposed by appellants, plaintiffs below, were directed only to appellee's attempt to cross-examine plaintiffs' witnesses on questions not gone into in the direct examination of said witnesses.

It was not considered to be of any substantial aid to this court to include in the transcript all of the matters set out in the certified copy of the testimony. Inasmuch

as appellee has sought to set up that it was "thwarted" in an attempt to pursue such investigation, it is desirable that said questions, objections, holdings, and comments be set out verbatim. The reference to transcript Page 47 has heretofore been set out (Reply Brief page 14) and the pertion noted as being narrated in transcript page 140 is set out on pages 87 and 88 of the certified copy of the transcript and is as follows:

Q. Now I am going to ask you to look at the Miottel patent, which is Defendant's Exhibit "G".

MR. RAMSEY: At this time the plaintiff objects to the attempt to qualify this witness as an expert on patent matters, on cross examination, unless the defendant wishes to make him his own witness. These questions were not gone into on direct.

COURT: Sustained.

MR. GEISLER: If Your Honor please, we are trying to show this Court what the difference is in construction, and the advantages; I am trying to show to the Court what is simply in the art, as every mechanic ought to know, and therefore I ask permission to cross examine this witness with regard to the difficulties a mechanic would have in making one piece or the other piece. They have introduced them, and they have read from the patent, this Peterson patent, and I am assuming that he understands what he is talking about. What is the Court's ruling?

COURT: The Court has ruled.

MR. GEISLER: I beg Your Honor's pardon. May I

go on? I don't quite understand. Am I supposed to make him my witness now?

COURT: I don't care whether you make him your witness or not. I say you can't cross examine him on a line which is not parallel to direct examination. He wasn't asked anything about these patents on direct examination, nor anything about anything except cost accounting, and as to certain features of one patent. If you want to go into the cost accounting, that is a different proposition.

MR. GEISLER: And is no objection to my examining this witness about his knowledge of mechanics, if I wish to do it by making him my own witness?

COURT: No, I haven't any objection. Make the attorney on the other side your witness if you want to. Of course that will be subject to their right of cross examination.

Appellee's Defense of a "Synthetic" Anticipation is Vague and Inconsistent

Appellee's defense is based solely upon the fact that the Patent Office did not enter of record the Edmands patent and the Fairchild Patent.

On page 7 of appellee's brief it seemingly is contended that the Edmands wrench is the full equivalent of the Eagle wrench.

At the bottom of page 7 and the top of page 8, the Fairchild patent is discussed, but no conclusion is drawn as to whether appellee contends that Fairchild

also is the full equivalent of the Eagle wrench, or whether appellee contends that Fairchild shows some of the elements set out in the Eagle claim, while Edmands shows other elements. This is rendered doubly vague because on page 20 of appellee's brief appellee concedes that the point made by appellants in their brief that "It is elementary that it is immaterial in a patentable combination that all the elements are old per se" is a correct statement of law.

On page 9 of said brief the contention is made that Edmands could be modified by substituting a socket support and a socket in lieu of the wrench head shown, or that the wrench head could be modified by the use of an adapter, without invention, because said parts are old per se.

On page 11, appellee switches back seemingly to the contention that Edmands, in view of Fairchild, modifying both and selecting parts therefrom, would constitute an anticipation of the Eagle patent.

On the bottom of page 12 and the top of page 13 appellee apparently urges that Fairchild, if modified, might constitute an anticipation of the Eagle patent.

At the bottom of page 13 and through page 14, appellee comments upon the modification of the Edmands patent in which the wrench head is pivotly **secured** to the handle and an adapter is placed in the wrench head. Appellee seemingly indicates that this roundabout method of attaining Eagle's results in a complicated manner and with bulky, expensive devices should be considered. Appellee urges modification upon

modification until entirely different wrenches are produced which function differently and produce different results.

To Make an Eagle Wrench From the Pieces of the Edmands Wrench and the Fairchild wrench Requires their Complete Dismemberment, Redesign or Adaptation, Resulting in a Complete Change in Structure, Function and Result

With most of said contentions it is necessary to use the Edmands wrench as a base. Said wrench comprises a handle terminating in a pair of spaced ears, forming the bifurcated portions of the handle, across which extend a flattened pin. A series of wrench heads, each provided with an integral unstanding slotted ear which, in one position is alined with the flattened portions of the pin, can be detachably and selectively secured to the handle. The wrench heads can become detached inadvertently when said slot is alined with the flattened pin and it is necessary to use the wrench in said position. (Tr. 106) Said wrench heads would be continually falling off (Tr. 149) and when said parts aline they catch and require the use of both hands to operate the wrench. (Tr. 147).

To modify the Edmands wrench so that it would be an Eagle wrench it is necessary first to make the wrench head and the handle inseparable, that is, pivotally **secured** to each other. As was admitted to appellee's expert Kelly (Tr. 107) the closing of the eye in Edmands as suggested by appellee's counsel would destroy its

utility as a handle with a removable head. The first step proposed thus would be a step backwards and would change the function and result of the Edmands wrench. The next suggestion is made that the wrench head instead of being a wrench head could be merely a socket support which was clearly not contemplated by Edmands in his patent, or even suggested therein. The next proposal is that the wrench head could be used and an adapter could be placed therein so the wrench head and adapter together would constitute a socket support. This would be a still further step backwards as it would destroy the utility of the wrench head and would require an additional piece.

The testimony of C. F. Carlborg formerly in charge of the shop end of appellee's business is that the Edmands wrench costs at least twice as much as the Eagle wrench. If to said cost the cost of an adapter would be added, a still greater variance in price would result. In addition the wrench head, adapter and socket would increase the assembled length of the parts thus built up until they would be too bulky. Somewhat the same experiment was made in the design of the Peterson wrench, (Plaintiffs Exhibit 8, Tr. 130) but was unsuccessful because "It cost more to manufacture, as it took slightly more material than the wrench XXX made on the Eagle pattern" and would not "operate in such a small space." (Tr. 135.)

The Fairchild wrench on the other hand is a ratchet wrench and is pivotally mounted in its handle merely to secure reversal of action. That is, if the head is arranged

in one manner it will give right-handed action and if the head is reversed it will give left-handed action. The head is pivoted merely to eliminate the necessity of a setting-ring commonly provided in wrenches of this character to reverse their action.

On cross-examination appellee's counsel spent substantial time (Tr. 42) questioning M. B. Pendleton about universal wrenches which also have pivoted head. On redirect said witness differentiated universal type wrenches and ratchet wrenches from flex-handle wrenches. This witness testified "that these wrenches cannot be used interchangeable but each has its own specific usefulness, each functioning in its own field, and in most instances said uses or functions do not overlap." (Tr. 46). Thus the Fairchild wrench, which is a ratchet wrench, does not even have the same uses as a flex-handle wrench although both use standard sockets and both are used for fastening and unfastening nuts upon bolts.

All of Proposals to Redesign Edmands Wrench are Modifications Proposed from "Hindsight Rather than Foresight"

All of the proposals made by appellee to aid its defense that the Edmands wrench or the Fairchild wrench can be modified piece by piece until the Eagle wrench is approximated are viewed from "hindsight rather than from foresight." There is no evidence that anyone perceived or conceived that a one-handed, flex-handle wrench, adapted to use standard sockets could be devised in a simple, inexpensive manner and that said

wrench would solve the problem of a multi-purpose wrench so long sought for by the entire wrench art. It is only after the problem is solved that appellee interposes its defense that the new results can be attained if some prior wrenches are dismembered and their parts used to build a new and different wrench differing in structure, function, and result. As was stated in the late case in this, the 9th Circuit, **Banker's Utilities Co. vs. Pacific National Bank** 18 Fed. (2nd) 16, 18:

“Anticipation is not made out by the fact that a prior existing device, shown in a prior patent, may be easily changed so as to produce the same result as that of the device of the patent in suit where the prior device was in common use, without it occurring to anyone to adopt the change suggested by the patent in suit.”

Case of Brady vs. Atlantic Works

Appellee herein has cited the case of **Brady vs. Atlantic Works** 107 U. S. 192, 200, which represents probably the furthestmost swing of the pendulum of judicial interpretation towards strict and narrow construction of patentable invention. Bearing in mind that appellee herein is a deliberate infringer and has copied appellant's patented wrench even as to minute details of construction it is difficult to understand how appellee can even suggest that the creators of said wrench which it deliberately copied are “speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy

tax upon the industry of the country, without contributing anything to the real advancement of the arts."

It is submitted that the deliberate copying and the pirating of a competitor's patented product is not an "honest pursuit of business." If appellee has any "fears and apprehensions of concealed liens and unknown liabilities to law suits," it was warned of said liens and potential liabilities before it commenced its deliberate infringement. The particularly pertinent portion of said citation is that appellee may be embarrassed by "vexatious accountings for profits."

An Inventor Who Has Made a Meritorious Contribution to the Art Should Receive Fair Compensation for His Rights, Especially from a Deliberate Infringer

The inventor, Samuel Eagle, has devised a wrench which has proved to be of substantial value to the wrench art. He has disclosed said invention to the government through the United States Patent Office and as a consideration for said disclosure has been granted a limited monopoly upon said invention. It is submitted that the art is advanced by such disclosures and the entire country is benefited by giving to inventors compensating consideration when they have made meritorious inventions.

"The court should be clearly convinced of the rectitude of its position before holding a patent invalid at the instance of an infringer who has copied the patented combination down to its minute details . . . We agree that if there be a

doubt, the presumption of novelty and invention arising from the patent should resolve that doubt in favor of the complaint.”

Brunswick vs. Wolf 222 Fed. 916 (C.C.A.)

It is submitted that the claim in the Eagle patent defines a patentable combination, involving invention.

Respectfully submitted,

CAKE & CAKE

JAUREGUY & TOOZE and

W. ELMER RAMSEY,

Solicitors for Appellants.

No. 7437

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit 15

G. J. WANDTKE,

Intervener and Appellant,

ALMA ANDERSON, WALTER ANDERSON and
ALFRED CHRISTOFANI, doing business as
Anderson & Christofani,

Libelants,

VS.

THE AMERICAN GAS SCREW "MARY E", her
engines, tackle, apparel, etc.,

Respondent,

JOE BORG, FRANK OLAGUES and ARTHUR
OAKLEY,

Interveners and Appellees,

FRANK GASSAGNE and A. BENEDETTI,

Interveners and Appellees.

BRIEF FOR INTERVENER AND APPELLEE, ARTHUR OAKLEY.

RESLEURE, VIVELL & PINCKNEY,

Balfour Building, San Francisco,

Proctors for Intervener and Appellee,

Arthur Oakley.

FILED

SEP - 4 1934

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No. 7437

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. J. WANDTKE,

Intervener and Appellant,

ALMA ANDERSON, WALTER ANDERSON and
ALFRED CHRISTOFANI, doing business as
Anderson & Christofani,

Libelants,

VS.

THE AMERICAN GAS SCREW "MARY E", her
engines, tackle, apparel, etc.,

Respondent,

JOE BORG, FRANK OLAGUES and ARTHUR
OAKLEY,

Intervenors and Appellees,

FRANK GASSAGNE and A. BENEDETTI,

Intervenors and Appellees.

BRIEF FOR INTERVENER AND APPELLEE, ARTHUR OAKLEY.

This case involves the status of one of the men on the "Mary E", a motor scow, so insignificant in size and importance that the official publication of the United States Department of Commerce specifies that her crew shall be *one* in number. One man was all that was necessary for her operation, but inasmuch as

the owner did his own stevedoring the "Mary E" carried three men, one of them, intervener and appellee Oakley, a combined operator, engineer and stevedore.

The question before this court is not, as appellant puts it: "whether the statutory regulations of commerce shall have any force and effect or not", but whether this man Oakley was, in fact, a captain of the scow or merely an operator, engineer or stevedore.

PRELIMINARY STATEMENT.

In order that this court may have before it the correct picture of the parties and the status of their respective claims and contentions, we make the following preliminary statement:

On January 16, 1933, the libelants, Anderson & Christofani, filed their libel in rem for repairs, in the sum of \$934.01.

On February 21, 1933, interveners Borg, Olagues and Oakley filed in rem for seamen's wages, claiming, respectively, \$366.50, \$310.00 and \$765.07.

Defaults of all parties were taken and the matter was ordered referred to the Commissioner. Testimony was taken and the Commissioner filed his report, allowing the claims of the parties then before him, according priority to the seamen interveners.

Thereafter, on May 10, 1933, Wandtke intervened with his own claim for \$57.95 and an assigned claim of Madden and Lewis for \$396.90, both claims being

stated as for repairs furnished at the request of the owners.

On June 20, 1933, Gassagne and Benedetti intervened for \$110.49, for repairs furnished at the request of the owners.

Foard-Barstow & Co. did not file, but was allowed a claim for supplies in the sum of \$50.00, by stipulation.

The matter was again referred to the Commissioner and a full hearing had, at which Mr. Hutton, counsel for Wandtke and Gassagne and Benedetti, opposed the claim of Oakley, asserting that he was the master of the "Mary E" and not a seaman, and that he had no lien for his wages. The question was submitted to the Commissioner on briefs. The Commissioner, in a carefully considered report, found Oakley was not the master of the "Mary E" and that he was entitled to a lien as a seaman and priority with Borg and Olagues over all other claimants.

From the Commissioner's report, exceptions were taken by Intervener Wandtke in behalf of himself and other persons interested. The exceptions were extensively briefed and submitted to Judge St. Sure, who duly affirmed the report of the Commissioner and overruled the exceptions.

This appeal is taken by Intervener Wandtke alone. The other parties interested evidently feel that they have had their day in court and that the combined decisions of the Commissioner and the District Court, on what is after all a question of fact, have decided the issue.

The boat was sold for \$2125.00. Costs of all parties and the claims of Borg and Olagues have been paid, and there remains in the registry of the court the sum of \$1146.07. The decision on the question whether or not Oakley was the master of the "Mary E" will determine whether or not this sum shall be applied first, to the payment of Oakley's claim and the balance divided between Madden and Lewis, Wandtke, Ford-Bardstow, Anderson & Christofani and Gassagne and Benedetti, or whether Oakley shall be excluded and the entire balance divided proportionately between the other claimants.

STATEMENT OF FACTS.

Appellant attempts to set forth the facts of this case in various portions of his brief. The only strictly accurate statement in the entire brief is contained in the opening sentence: She "* * * was engaged in carrying cargo between San Rafael and San Francisco". All of the remaining facts as set forth by appellant are matters upon which there was a conflict in the testimony, decided adversely to appellant by the Commissioner after hearing and observing the witnesses and their demeanor on the witness stand, or upon which there is no testimony whatsoever to be found in the record. The statement of facts to be found in the Commissioner's report is amply supported by the record and reads as follows:

"The testimony reveals that Oakley possessed an operator's license, and, that he had no master's, nor mate's, nor pilot's papers. He

signed no bills of lading, he collected no freight money, he never ordered supplies of any kind during the period he worked on the 'Mary E', he neither hired nor discharged any of the crew. He was usually occupied from 9 to 12 hours per day, his working day was divided as follows: 5 hours were spent in stevedoring, 2½ hours were devoted to steering the vessel, the balance of the time was used in running, attending to or repairing the engines. He ordered some minor repairs; sometimes supervised the repairing of the engine; at times repaired the engine; helped to attach a new rudder and painted the vessel.

On the other hand Oakley started the engines, steered and docked the boat. Under oath he subscribed as master to the enrollment in the Customs House and under oath he signed a report of the accident as master.

By stipulation between proctors it was agreed that the 'Mary E' is described as a vessel of 67 gross tons, 48 net tons, 60.1 feet in length, 25.8 feet in width, 6.2 feet in depth and the crew is called for as one man.

The 'Mary E' was engaged in transporting freight between San Francisco and San Rafael. The crew consisted of two stevedores in addition to Arthur Oakley. Oakley received monthly wages of \$160.00, which amounted to \$25.00 per month more than the monthly wages of each of the other two men (Oakley testified his wages were higher because he worked longer hours—this extra time was devoted to the maintenance of the engines)."

The above facts, as found by the Commissioner, are sufficient for all purposes. We might add, how-

ever, that the testimony discloses that the reason he was employed was that he was an engineer and that he had a strong back for his "freight breaking" activities; that the only duties he performed, which the other two stevedores did not, was to run and repair the engine; that for the last mentioned work of repairing the engine he received \$25.00 a month extra compensation; that after the machinery company refused credit to the owner, Oakley acted as a messenger and took various parts of the engine to the machine shop, because some one had to go to the machine shop to pick up the bill for the work done, to secure the cash from the owner, and to return to the machine shop with the cash before getting delivery of the repaired parts.

I.

THE RULE DENYING THE MASTER OF A VESSEL HAS A LIEN FOR WAGES SHOULD NOT BE EXTENDED BY ANALOGY TO EMBRACE PERSONS NOT HERETOFORE REGARDED AS MASTERS.

There are numerous cases which criticize the rule which denies to the master of a vessel a lien for his wages. The basis of such criticism is the fact that under modern conditions the rule often works injustice and the reasons for the rule no longer exist. The courts, however, have invariably come to the conclusion that although as an original question they would not deny a lien to a master, nevertheless it is not the province of the courts, particularly those of first instance, to change the established law and hold

that in the case of a master, who in fact exercises the ordinary duties of a master at sea, there is no lien for his wages. Discussion of this situation will be found in:

“*The Mariner*”, 298 Fed. 108;

Alabama Drydock Co. v. Foster, 31 Fed. (2d) 394.

We do not urge that the rule in question should be disregarded, but we submit that in view of its injustice, its inapplicability to modern conditions and the expressions of the courts as to the desirability and necessity for change, that the rule should not at this date be extended so as to embrace certain classes of seamen and marine workers, who are not in fact masters, and against whom the rule has never heretofore been applied.

What appellant is here seeking, is to have the rule as to masters extended by analogy to include persons others than masters. We submit that appellant is entitled to receive but little encouragement in this attempt.

II.

THE DECISION OF THE COMMISSIONER AND OF THE DISTRICT COURT ON A MATTER OF FACT SHOULD NOT BE DISTURBED ON APPEAL UNLESS FOR MANIFEST ERROR.

After a complete review of the facts of the case, based entirely upon testimony given in open court, where the Commissioner had full opportunity for observation of the character and demeanor of the witnesses, the Commissioner found, as follows:

“I find that Arthur Oakley was not clothed with the full responsibilities nor powers of a master but was in fact engineer, stevedore and operator. As such he comes within the category of a seaman.”

From the above finding, the Commissioner concluded as a matter of law that the claim of Oakley was entitled to be prorated with the other claims for seamen’s wages and was, with them, entitled to be paid first. The District Court confirmed this report.

Although the decree of the District Court is vacated by this appeal, and although it is frequently said that in such circumstances the admiralty appeal becomes a trial *de novo*, at which this court is entitled to investigate the matter anew, nevertheless a new trial on appeal in admiralty does not mean that the Circuit Court of Appeals will in every case inquire into the facts and substitute its own findings and conclusions on the evidence, for those of the two tribunals below.

This matter was succinctly stated in “*The Beaver*”, 253 Fed. 312, 313 (9th Cir.), in which this court said:

“* * * The entire mass of evidence upon which the trial court passed, with the exception of that of two or three witnesses for appellee taken on deposition, was heard in open court, with full opportunity for observation of the character and demeanor of the witnesses, and that evidence on all controverted facts was sharply conflicting. Such a case, notwithstanding a small portion of the evidence rests upon deposition, is to be regarded as well within the reason of the rule that the findings of the trial court should not be disturbed except for manifest error. * * *”

See also:

“The John Twohy”, 255 U. S. 77, 65 L. Ed. 511;

The “Mazatlan”, 287 Fed. 873 (9th Cir.);

Luckenbach S. S. Co. v. Campbell, 8 Fed. (2d) 223 (9th Cir.).

In the instant case, no question of law is involved since the pertinent rule contended for by appellant is admitted by appellee. The whole issue before this court is the question whether or not Oakley was in fact the master of the “Mary E”. The Commissioner and the District Court have found that he was not the master of the “Mary E” but a seaman. This finding should not be disturbed, since no manifest error appears. Hence the conclusion of law that Oakley was entitled to a lien, based upon the finding that he was a seaman, should stand.

III.

PERSONS SIMILARLY SITUATED TO OAKLEY HAVE BEEN HELD SEAMEN AND ENTITLED TO THEIR LIEN.

The case of *“The Atlantic”*, 53 Fed. 607, is squarely in point and on all fours with the one at bar. Quoting the facts and conclusions of the court:

“The libelant was engaged as engineer on the steam dredge Atlantic, and files this libel in rem for his wages. The respondent admits the service, but denies the lien, on two grounds—first, because this is his home port; and, second, *because the libelant was master of the dredge* * * *.

The wages were \$3.50 a day for every day the dredge was at work. The dredge was under the direction and control of the respondent, who made the contracts for her, and gave instructions when she should work. He was not on her, but gave his directions by visiting her in person, or by sending his son-in-law to represent him. *Libelant was the highest officer on the dredge* and directed the fireman and any other hands aboard. *He had no authority to purchase supplies for her, or to engage or dismiss hands aboard of her.* His wages were paid at the office of the respondent in Charleston, either to libelant or to his authorized agent.

It is a puzzling question whether libelant stood in the place of the master or not. He was employed by respondent, looked to him for his wages, was paid by him, was under the control of no one but him; and in these respects came within many of the reasons given for refusing the master his lien. *Drinkwater v. The Spartan*, 1 Ware, 158; *The Eolian*, 1 Bliss. 321. On the other hand, he had none of the responsibility or powers of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. *Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense. He was employed because he was an engineer, and his chief duties were to run the engine.*”

In “*The John McDermott*”, 109 Fed. 90, 92, the facts as found by the Commissioner and adopted by the court disclose a much stronger case for the contention against the lien than the one presented by the

learned opposing counsel here, since the lien claimant in that case had the right to hire and discharge the help, to order supplies and repairs and had full charge of the men. Nevertheless the court allowed the lien.

“The exception to the allowance of lien to John Shea is on the ground that he was master of Dredge No. 2, and was therefore not entitled to a lien. The finding of the commissioner as to his position is as follows:

‘John Shea presented a claim of \$200.00 for seaman’s wages against the avails of sale of dredge No. 2, and the same was contested on the ground that he was master of the dredge, and not entitled to seaman’s wages. It was proved and conceded that *the duties performed by this claimant were the general superintending of the work; that he ran the engine of the dredge, and performed the duties of engineer and fireman and general deck hand on the dredge.* He had the right to hire and discharge the help employed in the gang of dredgers, and to order such supplies as were needed for all hands, and such repairs as were needed to keep the dredge in working order. He received no pay for freights or for any work done by the dredge, except through the owners. The dredge was not capable of being navigated. He lived upon the dredge, and took care of it, and attended to its proper repairs and preservation; but outside and beyond that he had no benefit of position other than that of his crew, except larger pay. He could not pay himself out of any moneys in his hands, for none came to him as the earnings of his craft. The earnings all came to the company, and I find that he was

as much entitled to a maritime lien upon the dredge for his wages as were any of the crew.'

*It appears that Shea was licensed as master, and had brought suit in the state court before the libel was filed for wages as such master, and had contracted bills. He 'had full charge of the dredge, attended to all of the repairs, and had full charge of the men'. But the cases cited by counsel to support this exception do not sustain their contention. None of the reasons which are generally given to show that a master should have no lien are present in this case. As is found by the Commissioner, Shea was only a general superintendent of the work, running the engine and performing the duties of engineer, fireman, and general tugman. No freight or other moneys passed through his hands, and the dredge was not capable of being navigated. His case is within the decisions in *The Atlantic* (D. C.), 53 Fed. 607; *McRae v. Dredging Co.* (D. C.), 86 Fed. 344; and *The Steam Dredge No. 1* (D. C.), 87 Fed. 760. The exception to the allowance of the Shea claim is overruled."*

In *McRae v. Bowers Dredging Co.*, 86 Fed. 344, 348, 349, the court said:

*"I find no difficulty in pronouncing in favor of the engineers, firemen, deck hands, and captains who worked on board of the dredgers. They have maritime liens for the balances due to them for wages. The captains were not clothed with the authority of masters, but were simply foremen in charge of the working crews. Therefore the rule that the master of a vessel has no lien for wages does not apply to them. * * **

The claims to liens for wages and for supplies and repairs are founded, not only upon the general maritime law, but also upon a statute in force in this state * * *."

In "*The Pauline*", 138 Fed. 271, 272, the court, in holding the navigators of excursion steamers not to be masters for the purpose of a lien, adopted the following finding and decision of the Commissioner:

"As to the last question, the testimony before me shows that Corbett, the owner of the boats, had been in the saloon business and that he held no license either as master or pilot, nor had he any knowledge of navigation. The boats were excursion steamers and employed in running from Harlem River to Classon's Point, Long Island, where a summer resort was maintained by one Cowan who had made a charter of the boats from Corbett. The boats did no freight business and all of the fares of the passengers were collected either on the boat or on the wharf through the sale of tickets by Cowan or his employees. Corbett, on the other hand, hired and discharged the crew and bought all supplies, coal, waste, oils, &c. for both boats, as well as attending to all business with Cowan. *Simons and Purnell had no duties other than the navigation of the boats. Both held master's and pilot's licenses.* Corbett appeared in the custom house papers as master of the 'Pauline' and one Kiernan whom Purnell succeeded as master of the 'Young America'. * * *

I therefore find that Simons and Purnell were not masters but were pilots and are therefore entitled to their lien."

In "*The A. H. Chamberlain*", 206 Fed. 996, 998, the court, holding the captain of a scow who performed the duties of a deckhand was not the master for the purpose of a lien even though the owner's representative set forth the facts and law as follows:

*"The libelant signed himself as captain, receipted bills of lading, and generally acted as the owner's representative in whatever was necessary to be done upon the scow's trips. In some instances he accepted freight money and applied it to his wages account. In other respects he was but a mere deckhand, and in fact during the greater part of the time was the only person employed upon the scow for everything which had to be done. Such a man would not be a master, and it would seem could have a lien for wages as a general proposition. * * **

(2) Section 4612 R. S. (U. S. Comp. St. 1901, p. 3120), defines a master to be 'every person having command of a vessel of a citizen of the United States', while 'Seamen' are 'persons employed to serve in any capacity on board the same'. These definitions are for the purposes of 'Title 53' relating to 'Merchant Seamen'. *But by analogy a boat having no 'seamen' required to sign for the voyage, and hence having no master, would still be the subject of a maritime lien by a wage-earner working thereon, unless the boat be a canal boat or local craft not subject to admiralty jurisdiction. Orleans v. Phoebus, 36 U. S. (11 Pet.) 182, 9 L. Ed. 677.*

But the captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements nor em-

ployment, and can act only as agent, in the sense that any sailor might act under specific direction of his captain, is not a master, and does come within the provisions of the section."

The above quoted case seems to differ from the one at bar only in so far that Oakley's position is much stronger than that of the one man captain and crew of the scow.

In "*The Hurricane*", 2 Fed. (2d) 70, 72, affirmed 9 Fed. (2d) 396, the court said:

"In the libel filed on behalf of J. W. Mairs and Edward S. Field, liens for wages are claimed on behalf of Mairs for services as dipper tender on the dredge, and on behalf of Field as chief operator in charge of its operation. I have no doubt that the Hurricane, being engaged in the work of deepening channels in navigable water, an occupation incident to navigation, is a vessel within the meaning of section 8392, Comp. Stat., and that Mairs and Field, being employed in the operation of the dredge, are seamen entitled to liens for their wages. *While Field was known as 'captain', he was so designated merely because he was the foreman in charge of the work under the direction of the superintendent of the Canal Construction Company. He was not a licensed master.*"

IV.

“ADMIRALTY DEALS WITH THINGS, NOT WORDS”—HENCE APPELLANT’S CONTENTION THAT OAKLEY HAVING TAKEN THE MASTER’S OATH AT THE CUSTOMS HOUSE IS ESTOPPED FROM ASSERTING THAT HIS CAPACITY IS THAT OF A SEAMAN IS ERRONEOUS.

Appellant maintains, with much vigor, that Oakley having signed the master’s oath, he is estopped from denying that he was the master and from claiming a lien for his wages as a seaman.

There was also some testimony to the effect that certain persons addressed Oakley as “Captain” and that he did not raise any objection. There was also some testimony to the effect that he told people that he was the master and particularly some of the people at Madden & Lewis’ shipyard. There is in the record evidence to the contrary. Oakley explained, if we remember his testimony correctly*, that many seafaring men are addressed as “captain”, whether or not entitled to that appellation. If he was so addressed, the salutation was accepted by him in the same spirit that many attorneys are addressed as “Judge”, or many elderly gentlemen residing in the Southern States are addressed as “Colonel”.

***THIS APPEAL SHOULD BE DISMISSED FOR FAILURE OF APPELLANT TO COMPLY WITH THE RULES OF THIS COURT.**

We are unable to give page references to the apostles for the reason that no apostles have been printed. At least no copy has been served on appellee. Appellee is also handicapped in the matter of quoting or referring to testimony, as the trial of this matter took place many months ago and even the typewritten record is not available to us since the small amount involved in this case did not justify the expenditure by a seaman of the money necessary to secure a copy of same. We submit that the appeal should be dismissed on the grounds that the record has not been printed in compliance with the rule and on the further ground that without application for or leave of court, appellant has failed to print his brief. It would be no slight hardship if certain litigants and their counsel were privileged to dispose with the printing of the record and the printing of briefs if the rule is to continue into effect as to other litigants and their counsel.

In the case of *The "Imogene N. Terry"*, 19 Fed. 463, the libelant in his libel described himself as master of the sloop "Imogene N. Terry". As a matter of fact, the libelant in that case was nothing more than a seaman in charge of the "Imogene N. Terry", a tender to another vessel, the "Frank C. Barker". It was contended that the libelant, having described himself as master, and being in charge of the "Terry", was not entitled to a lien. The court, however, held that because "he earned no freights and no money passed through his hands from the earnings of the vessel", he was not master of the vessel and that the actual fact would control and not the description of himself by the libelant.

The court very aptly puts the matter as follows:

"In the above libel the libelant, with some self-complacency, describes himself as master of the sloop Imogene N. Terry. *But courts of admiralty deal with things, and not with words.* If the proofs show that he is in fact an ordinary seaman, under the control of the master, his calling himself the captain ought not to hinder him from invoking the seaman's remedy for the collection of his wages."

In the case of "*L'Arina*" v. *The Exchange*, 14 Fed. Cas. 8088, the libelant had signed as master of the brig "Exchange" at the Custom House in order to enable the vessel to clear. The court, however, held that this did not constitute him the master, if he was not such in fact. The court said:

"At a summary hearing of this case, a plea to the jurisdiction of the court was urged, because

the actor being master of the vessel could not sue in the admiralty or make her liable for his wages, his remedy being against the owners only. It appeared in evidence that the actor was merely called master of the brig, but never was considered so, or acted as such, except by lending his name to clear the vessel at the Havanna. * * *

In considering the case, the court decided that the actor never was captain in fact, and therefore not barred from suing here.”

To a similar effect see *Peterson v. "The Nellie and Annie"*, 37 Fed. 217, where the person on the ship's papers as master was held entitled to a lien where it shows that he was not the master but another occupied that position in fact.

Appellant makes the contention that a vessel cannot run without a statutory master, and hence, Oakley having signed at the Custom House as master, he became master for all purposes. As a matter of fact, the statutory law of the United States is perfectly clear to the contrary on this subject.

U. S. Code, Title 46, Sec. 223, provides:

“Minimum number of officers. The board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise seagoing merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:

*No such vessel shall be navigated unless she shall have on board and in her service one duly licensed master. * * * Provided, That this section*

shall not apply to fishing or whaling vessels, yachts, or motor boats as defined in Chapter 16, or to wrecking vessels."

Therefore, while it is true that no ocean or coast-wise seagoing merchant vessel of the United States propelled by machinery, or ocean-going vessel carrying passengers, shall be navigated unless she has in her service a duly licensed master, it is expressly provided that motor boats, as defined in Chapter 16, may be navigated without a master. The "Mary E" was a motor boat within the terms of the exception, since she was less than 65 feet in length, and not a tug boat or tow boat propelled by steam. The appropriate sections with regard to motor boats are as follows:

U. S. Code, Title 46, Section 511:

" 'Motor Boats' defined; inspection. The words 'motor boat' where used in this chapter shall include every vessel propelled by machinery and not more than sixty-five feet in length except tug-boats and towboats propelled by steam."

U. S. Code, Title 46, Section 515:

"* * * All motor boats carrying passengers for hire * * * and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. * * * Provided, That motor boats shall not be required to carry licensed officers, except as required in this chapter."

The cases cited by appellant on this subject are not in point.

In *The "Ticeline"*, 221 Fed. 409 (appellant's type-written brief p. 3), there was no question involved as to a maritime lien. The case involved a collision and it was sought for the purposes of the fellow servant doctrine to hold the pilot in charge at the time of the collision as master. The vessel had in fact a master, who was named on the certificate of registry of the boat. The language of the court applicable to a question whether a pilot could be master as well as the actual and registered master cannot be applied to a situation such as is involved in the instant case.

In *The "Chicago"*, 235 Fed. 538 (appellant's type-written brief p. 3), it was held that the libelant, who was engaged merely for the navigation of the barge "Chicago" and who performed the ordinary duties of master of the barge, was in no sense a master, who could not have a lien for his services. As a matter of fact, the claimant and owner of the vessel was registered as her master and the court says that if any one was the master of the barge, it was the owner, whose name appeared on her document. This case simply held that the libelant was not the master because another person was registered as the master. It does not logically follow that one who is not in fact the master, becomes such simply because his name is signed at the Customs House as master.

The forms at the Customs House are designed for vessels which actually have masters. They are not adapted to the situation of a small scow which does not require a master. Oakley signed as master simply

because there was no one else to do so and the Customs House form had to be filled in in some way.

In *The "Vandercook"*, 24 Fed. 472 (appellant's typewritten brief p. 4), the vessel was a duly enrolled seagoing tug. The libelant, although he describes himself as mate, was *in fact* the master.

In *Adams v. "The Wyoming"*, 1 Fed. Cas., Case No. 71, there was no question but that the libelant was in fact the master. Incidentally, he appeared on the ship's papers as master.

The case of *Dubuque*, 2 Abbott's U. S. 20 (appellant's typewritten brief, p. 7) may be similarly distinguished.

All that the cases cited by appellant hold is that where a vessel has in fact a master, the question as to who is master will ordinarily be determined by the name which appears in her document. To make the situation perfectly clear, let us assume that the "Mary E" was the class of boat which carried a master. That Oakley was originally the master and signed the master's oath. Thereafter, another master was employed and Oakley put on as engineer. Would it be seriously contended that because his name still remained on record at the Customs House that the engineer and not the real master was master and that the engineer would have no lien.

V.

APPELLANT'S CONTENTION THAT OAKLEY WAS PERSONALLY RESPONSIBLE FOR THE REPAIR CLAIMS AND HENCE COULD NOT ASSERT A LIEN TO PREJUDICE THE OTHER LIEN CLAIMANTS, BEGS THE QUESTION AND IS OTHERWISE UNSOUND.

Appellant contends that Oakley was Captain and ordered the repairs, hence under *Section 2382 of the California Civil Code* he was personally liable for the bills. This contention begs the question as to whether or not Oakley was Captain, the entire issue in the case, and assumes that he ordered the repairs.

If our memory serves us correctly the testimony in this case is that certain minor repairs were ordered by Oakley after the owner was on a cash basis and could not get credit. Even then Oakley acted more in the nature of messenger for the owner or as engineer. Naturally these repairs could not be the ones sued upon as they were paid for in cash.

Any testimony as to other repairs being ordered by Oakley was contradicted. Moreover, the libels in intervention all show on their face that the repairs were furnished *at the request of the owners*, and the suits were against the vessel not against Oakley.

We will not burden this court with a further discussion of this point. If Oakley was not the master the point fails, since there could be no personal responsibility. If he was master then he would have no lien, so that a determination as to his personal responsibility is unnecessary.

CONCLUSION.

It is respectfully submitted that Oakley was not master in fact; that he was entitled to a lien; that the findings of the two lower tribunals, not having been shown to be manifestly in error, should stand, and that the decree should be affirmed.

Dated, San Francisco,
September 1, 1934.

Respectfully submitted,
RESLEURE, VIVELL & PINCKNEY,
Proctors for Intervener and Appellee,
Arthur Oakley.

(SLS)

